SUPREME COURT, U.S.
FILED
97 1589 MAR 23 1998
OFFICE OF THE CLERK

No. 98-__

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ERNST & YOUNG, a Canadian Partnership of Chartered Accountants, *Petitioner,*

vs.

THE COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, *Respondent.*

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

PETITION FOR A WRIT OF CERTIORARI

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March 23, 1998

MERRILL CORPORATION, (404) 237-0038

100 pp

QUESTION PRESENTED

Where a professional partnership of Canadian chartered accountants, not certified to practice accounting in the United States and having no direct contacts with Michigan, reports on the financial statements of a Canadian insurance company in Canada pursuant to Canadian accounting and auditing standards, does the Canadian accounting firm's knowledge that its multinational corporate client does business in the United States and may send the accounting firm's audit opinion into Michigan for review by regulators and/or policyholders satisfy the constitutional minimum contacts standard for personal jurisdiction over the accounting firm by a Michigan court?

LIST OF PARTIES

The following are co-defendants with Ernst & Young, chartered accountants, in the action now pending in the trial court, the Circuit Court of Ingham County, Michigan. These parties to the proceedings below were not parties to the Appeal and therefore are not named in the caption to this Petition.

George R. Albino
William H. Alexander
John D. Allan
William G. Benton
Bennett A. Brown
Patrick D. Burns
Paul G.S. Cantor
William D. Douglas
Mark E. Edwards
Kenneth E. Field
Nan-B de Gaspe Beaubien
Irving R. Gerstein
Anthony F. Griffiths
Sir Anthony S. Jolliffe
George E. Mara
Robert W. Martin
David R. McCamus
Daryl E. McLean
Andre Monast
Michael D. Regester
John A. Rhind
Michael Rosenfelder
Borden D. Rosiak
Michael J. White
Adam H. Zimmerman
Harris Trust and Savings Bank
Ernst & Young LLP
Ernst & Young International

Confederation Treasury Services, Ltd., a subsidiary of Confederation Life Insurance Company, has been added to the proceedings below as a third-party defendant.

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No. 98-__

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

ERNST & YOUNG, a Canadian Partnership
of Chartered Accountants, *Petitioner*,

v.

THE COMMISSIONER OF INSURANCE
OF THE STATE OF MICHIGAN, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE STATE OF MICHIGAN

Ernst & Young, a Canadian partnership of chartered accountants ("E&Y-Canada"), respectfully petitions for a writ of certiorari to review the judgment below of the Court of Appeals for the State of Michigan.

OPINIONS BELOW

The order of the Michigan Supreme Court denying E&Y-Canada's Application for Leave to Appeal is reported *sub nom. Commissioner of Insurance of the State of Michigan v. Albino, et al.*, 456 Mich. 905, 572 N.W.2d 13 (1997), and reproduced

in Appendix D, *infra*. The opinion of the Michigan Court of Appeals is reported *sub nom. Commissioner of Insurance of the State of Michigan v. Albino, et al.*, 225 Mich. App. 547, 572 N.W.2d 21 (1997), and reproduced in Appendix C, *infra*.

JURISDICTION

The judgment of the Court of Appeals of Michigan was entered on September 30, 1997. On December 23, 1997, the Supreme Court of Michigan entered an order denying E&Y-Canada's Application for Leave to Appeal. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The provision of the United States Constitution involved is the Due Process Clause of the Fourteenth Amendment:

Section 1: ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

This case raises an issue affecting all professionals, including accountants, lawyers, doctors and architects, who provide opinions or otherwise perform intangible services for clients. That issue, on which the circuits are split, is whether a court may exercise personal jurisdiction over a professional when the professional's only contact with the forum was its knowledge that work performed by it for a client in its home jurisdiction might be communicated to persons in that forum.

On this issue, some lower courts have concluded that foreseeability that a professional's opinion or advice may be used in other jurisdictions is not alone sufficient to support personal jurisdiction. *See* pages 16-21, *infra*. Other circuit courts, and the Michigan Court of Appeals in this case, have held that foreseeability to the professional that its client may use its opinion and that the opinion may be relied upon by third parties in a foreign forum is alone sufficient to subject the professional to jurisdiction in that forum. *See* pages 21-22, *infra*. Under those holdings, a professional firm could be haled into court in any state where, foreseeably, its opinion or advice might be used, despite that professional firm's having no direct contacts with the forum.

Particularly given the dramatic expansion of commerce between the United States and countries around the world, this issue is of paramount interest to all accountants, lawyers and other professionals who render advice that may be used by clients having relationships with many states and countries.

Here, Petitioner E&Y-Canada does not dispute that it knew that the opinions it delivered to its Canadian client in Canada would be included in its client's annual reports and could be sent by the client to Michigan and many other states and countries where the client's policyholders resided. At the same time, it is established that E&Y-Canada had no other contacts in or with the State of Michigan.

A. The Underlying Claims

This lawsuit stems from the August 1994 seizure of the business of Confederation Life Insurance Company ("CLIC"), a mutual insurance company organized under the laws of Canada, with its principal office in Toronto, Ontario, Canada.

The Court below described the seizure as "the largest insurance company insolvency in North American history." 225 Mich. App. at 550 (App. C-2).

Formerly one of the largest insurance companies in Canada, CLIC did business, either directly or through its subsidiaries, in Canada, the United States, and the United Kingdom. Its U.S. headquarters were in Atlanta, Georgia; as is the practice for many Canadian life insurers, its "port of entry"[1] into the United States was Michigan although its headquarters were not located there.

In August 1994, the Superintendent of Financial Institutions Canada, CLIC's primary regulator, took control of the assets of CLIC pursuant to the Canadian Insurance Companies Act. Respondent Commissioner of Insurance for the State of Michigan, Plaintiff below, took control of the U.S. assets of CLIC pursuant to an order of rehabilitation entered by the Ingham County Circuit Court, Michigan, on August 12, 1994. Respondent is also pursuing claims against CTSL, a CLIC subsidiary, in Ontario. CLIC's total company liquidation is proceeding in Ontario, while liquidation proceedings as to CLIC's United States assets are ongoing in Michigan.

In June 1995, Respondent brought this lawsuit in Ingham County Circuit Court, Michigan, in his capacity as Rehabilitator

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[1] Every foreign insurer wishing to do business in the United States must select a "port of entry," which determines which of the 50 state insurance commissioners will have primary responsibility for monitoring the company's financial solvency in the United States. An insurer's port of entry is not determined by where it writes the most business or where its U.S. headquarters are located.

of the U.S. assets of CLIC,[2] asserting common law theories of contract and tort against numerous defendants, including former officers and directors of CLIC and an Illinois bank in which CLIC deposited assets pursuant to a requirement of Michigan law.

The Canadian partnership of chartered accountants[3] practicing under the name "Ernst & Young" ("E&Y-Canada") was also named as a defendant, as was Ernst & Young LLP, a separate and independent U.S. partnership operating under the Ernst & Young name throughout the United States.[4] Pursuant to the Insurance Companies Act of Canada, CLIC had engaged E&Y-Canada to audit CLIC's consolidated financial statements[5] for the years 1991, 1992, and 1993. To the extent accounting work was performed in the United States, it was performed by Ernst & Young LLP, not E&Y-Canada.

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[2] Respondent purports to assert his claims on behalf of what he styles the "U.S. Branch" of CLIC (its assets and liabilities in the United States), the U.S. policyholders of CLIC, and the Michigan Insurance Bureau.

[3] In Canada, licensed public accountants are referred to as "chartered accountants," whereas in the United States, they are referred to as "certified public accountants."

[4] E&Y-Canada is an entirely separate and independent legal entity from the Ernst & Young firm in the United States, which is also named as a defendant in this lawsuit. E&Y-Canada and Ernst & Young LLP in the United States do not share partners, employees, revenues, or business records. While each is authorized to use the "Ernst & Young" name, neither firm controls or supervises the actions of the other.

[5] "Consolidated" financial statements cover the financial condition of a company taken as a whole and do not reflect separately a company's business in a particular country or as to a particular subsidiary or branch.

Respondent claims that E&Y-Canada's audit reports and CLIC's financial statements failed to disclose material facts and seeks to hold E&Y-Canada liable in Michigan for damages allegedly exceeding $600 million, on common law theories of professional negligence, fraud, breach of contract, and negligent misrepresentation.

B. How the Jurisdictional Question Was Raised

E&Y-Canada filed a motion for summary disposition for lack of personal jurisdiction in the Ingham County Circuit Court, on the grounds that Michigan's exercise of personal jurisdiction over E&Y-Canada would violate Michigan's long-arm statute and would offend the limitations on Michigan's jurisdiction imposed by the Due Process Clause of the Fourteenth Amendment. The trial court denied the motion. Appendices A, B.

E&Y-Canada then sought and obtained leave to appeal the trial court's order to the Court of Appeals for the State of Michigan, again on the grounds that the exercise of personal jurisdiction over E&Y-Canada in Michigan violated due process. The Court of Appeals issued a 2-to-1 opinion affirming the trial court's exercise of personal jurisdiction over E&Y-Canada. Appendix C.

E&Y-Canada then sought leave to appeal the Court of Appeals' decision to the Supreme Court for the State of Michigan, based upon due process grounds. The Michigan Supreme Court entered an order denying E&Y-Canada leave to appeal, stating, "[W]e are not persuaded that the questions presented should be reviewed by this Court." Appendix D-2.

C. Statement of Material Facts

1. E&Y-Canada's Engagements with CLIC Were in Canada.

The Michigan Court of Appeals' majority opinion acknowledged several critical facts. E&Y-Canada is a partnership of Canadian chartered accountants headquartered in Toronto. E&Y-Canada has never done business in Michigan, has no employees or property in Michigan, and has provided no auditing or accounting services in Michigan; E&Y-Canada has no physical presence in Michigan. CLIC engaged E&Y-Canada in Canada to render professional accounting and auditing services in Canada; E&Y-Canada was paid for the professional services by CLIC in Canada. 225 Mich. App. at 552, 556 (App. C-5, C-9).

The record additionally reflects that E&Y-Canada's engagements with CLIC were initiated by CLIC from its headquarters in Toronto, Ontario, Canada. The terms of those engagements were negotiated and agreed to in Toronto. E&Y-Canada supervised the CLIC engagements from Toronto, pursuant to Canadian accounting rules and auditing standards; the CLIC audit engagements were performed at CLIC's offices located in Ontario, Canada. To the extent certain audit procedures needed to be performed at CLIC's offices in Atlanta, Georgia, and London and Luton, England, E&Y-Canada contracted with separate firms practicing under the name of "Ernst & Young" in the United States and the United Kingdom respectively to perform those distinct and separate procedures in their respective countries. No accounting or audit service was performed in Michigan or by Michigan residents for CLIC or any of its subsidiaries. All payments for services rendered by E&Y-Canada in connection with the CLIC audits were paid

by CLIC in Canadian currency, and were received by E&Y-Canada in Canada.

The following facts are similarly not in dispute. E&Y-Canada issued its audit reports on the consolidated financial statements of CLIC from its main offices in Toronto, and did so pursuant to Canadian generally accepted accounting principles, as articulated by the Canadian Institute of Chartered Accountants, and pursuant to the requirements of CLIC's primary regulator, the Office of the Superintendent of Financial Institutions Canada ("OSFI"). E&Y-Canada did not send CLIC's consolidated financial statements or its audit reports to the Michigan Insurance Bureau or to anyone in Michigan. Rather, CLIC incorporated E&Y-Canada's audit report delivered in Canada into its annual report, which CLIC then sent to its agents and others in Canada, the United States, and the United Kingdom. To the extent that Michigan regulators had any contact with E&Y-Canada, it came only when the Michigan regulators traveled to Canada to review workpapers.

2. *E&Y-Canada Is Subject to Professional Requirements and Regulations Limiting the Geographic Scope of its Practice.*

The absence of contacts between E&Y-Canada and Michigan is entirely consistent with professional licensing requirements and other regulations of the accounting professions in both Canada and Michigan. Canada has its own set of licensing and auditing standards that differ from the generally accepted auditing standards applicable to certified public accountants in the United States. Michigan law prohibits Canadian chartered accounting firms from practicing accountancy in Michigan unless they are certified to do so by Michigan. Mich. Comp. Laws § 339.702(2). Michigan law

permits only certified public accountants to be partners of public accounting firms practicing in Michigan, *id.* § 339.705; similarly, Canadian professional rules require that only chartered accountants be partners of Canadian public accounting firms. *See* Rule 405 of the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario.

These professional requirements restrict E&Y-Canada's practice of accountancy to Canada. E&Y-Canada is not certified by Michigan to practice public accounting in Michigan. E&Y-Canada has no partners or employees in Michigan; it has no registered agent for service of process in Michigan; owns no property, real or personal, in Michigan; and maintains no offices, books, records or bank accounts in Michigan.

3. The Court of Appeals' Decision

The Michigan Court of Appeals, by a 2-to-1 majority, held that, despite E&Y-Canada's lack of direct contacts with Michigan, E&Y-Canada had purposefully established minimum contacts with Michigan sufficient to justify the exercise of personal jurisdiction in Michigan. The Court concluded that such a finding was appropriate because (1) E&Y-Canada had rendered professional accounting services to a multinational company that, while a Canadian insurer, was also deemed under a Michigan legal fiction to be a Michigan domiciliary, and (2) the evidence showed that E&Y-Canada foresaw that CLIC's annual reports, including E&Y-Canada's audit opinions, would be sent by the client to Michigan as part of its client's regulatory filings and would be relied upon by Michigan regulators and policyholders. 225 Mich. App. at 562 (App. C-16). The Court of Appeals majority analogized the professional's opinion to a SCUD missile being fired into

Michigan, and concluded that a Canadian chartered accountant could be haled into a Michigan court just as a party who fired such a missile. *Id.* (App. C-15-16).

In support of its conclusion that there were sufficient minimum contacts to support personal jurisdiction, the Court of Appeals majority relied upon two documents, an "awareness letter"[6] and an audit engagement overview, as evidence that E&Y-Canada knew that its audit reports would be sent by CLIC to Michigan for use by regulators and policyholders. The text of those same documents, however, underscores the fact that E&Y-Canada was performing audits exclusively under Canadian law and accounting rules.

The Audit Engagement Overview, an audit planning document, stated:

> In accepting the audit engagement of Confederation Life Insurance Company (the "Company") we assume a responsibility to the policyholders and directors of the Company, *and the Superintendent of Financial Institutions* [of Canada] to report on the financial statements of the Company and its subsidiaries. *Our primary objective in fulfilling this responsibility is to discharge our statutory obligation under The Insurance Companies Act* [of Canada] (the "Act") which requires us to perform an audit in accordance with

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[6] Michigan law requires that the insurers submit a letter from their accountants stating that the accountants are aware of applicable Michigan law. Mich. Comp. Laws § 500.1009. An exception is made, however, for Canadian insurers like CLIC, whose "awareness letter" is required to state that the accountant is aware of *Canadian*, not Michigan, law. *Id.* § 500.1025(2).

> the [Canadian] generally accepted auditing standards and issue an audit opinion to the policyholders and directors of the Company.

225 Mich. App. at 553-54 (App. C-6 (emphasis added)).

The "awareness letter," provided to CLIC by E&Y-Canada in Toronto and then forwarded by CLIC to the Michigan Insurance Bureau, stated in relevant part:

> We are independent with respect to the Company *and conform to the professional standards as contained in the Rules of Professional Conduct of the Institute of Chartered Accountants of Ontario.*
>
> . . . .
>
> *We are aware of the provisions in the Insurance Companies Act [of Canada] and the rules and regulations of the Office of the Superintendent of Financial Institutions* [of Canada] that relate to accounting and financial matters.
>
> On completion of our audit, we will express our opinion as to the fair presentation, in all material respects, of the financial statements of the Company in accordance with generally accepted accounting principles, *including the requirements of the Superintendent of Financial Institution[s] in Canada.*
>
> We will retain workpapers prepared in the conduct of our audit . . . *and, on instructions from the*

> *Company, will make them available for review by the Michigan Department of Insurance.*
>
> This letter is furnished solely for *you* [CLIC] to comply with Section 1009(2) of the Michigan Insurance Code and should be used for no other purpose.

Plaintiff's Response to Defendant Ernst & Young-Canada's Motion for Summary Disposition for Lack of Personal Jurisdiction, Exhibit I (emphasis added).

REASONS FOR GRANTING THE PETITION

At least eight federal courts of appeals have had the opportunity to consider the nature of the contacts necessary to subject a nonresident professional to jurisdiction in a forum where the professional's client, but not the professional, does business. These courts have applied irreconcilably different interpretations of the law and the facts in the cases before them, and a significant conflict has developed. Some of the decisions, including the decision of the court below, have included reasoning at odds with that prescribed by this Court in other contexts.

These conflicting decisions have created for professionals substantial uncertainty as to when they will and will not be subject to suit in a particular forum. Especially given the now-customary reach of client businesses to multiple jurisdictions, nonresident professionals should not face such conflicting determinations as to whether their clients' multi-state or multinational activities will or will not subject them to jurisdiction in a range of states or countries where the

professionals otherwise neither do business nor seek to do business. The Court should resolve the issue in order to reestablish predictability in jurisdictional determinations as to professionals and professional firms, and to ensure that defendants identically situated will not be treated differently based solely upon the particular forum seeking to exercise jurisdiction.

A. The Analysis of the Michigan Court of Appeals is in Conflict with this Court's Precedent.

More than half a century ago, the rigid jurisdictional requirements of *Pennoyer v. Neff*, 95 U.S. 714 (1878), gave way to the more flexible "minimum contacts" standard of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). But, in the cases following *International Shoe*, this Court has repeatedly cautioned that a more flexible jurisdictional standard does not eliminate fundamental constitutional restrictions on the assertion of jurisdiction. "Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States." *Hanson v. Denckla*, 357 U.S. 235, 251 (1958).

As a prerequisite to jurisdiction, this Court has explained that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. The minimum contacts standard "protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen*

Corp. v. Woodson, 444 U.S. 286, 292 (1980). This Court has "never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution." *Id.* at 293.

The decision below and the similar decisions of various circuit courts are, we submit, inconsistent with those fundamental limiting principles as to personal jurisdiction. Among other things, inconsistent with the holding of the court below, this Court has held in a products liability context that foreseeability that a product could find its way through the stream of commerce to a forum is not sufficient for personal jurisdiction under the Due Process Clause. *Id.* at 295. As the plurality said in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987):

> The "substantial connection" between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . [A] defendant's *awareness* that the stream of commerce may *or will* sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.

Id. at 112 (citations omitted) (emphasis added).

Also inconsistent with the analysis of the court below are *Burger King, Asahi* and *World-Wide Volkswagen*, where this

Court held that in determining whether a nonresident defendant has purposefully availed itself of the forum, only the defendant's own conduct and connections with the forum, not those of a third party, may be considered. *E.g., Asahi*, 480 U.S. at 112 ("[t]he 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant") (citation omitted); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("a defendant will not be haled into a jurisdiction solely as a result of . . . the 'unilateral activity of another party or a third person'") (citations omitted); *Hanson*, 357 U.S. at 253 (the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State") (quoted in *World-Wide Volkswagen*, 444 U.S. at 298). The purpose of having such a requirement is to establish a degree of predictability to the analysis "that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297.

Although the Court's prior decisions thus indicate that in the context of professionals and professional firms it would likely reject decisions such as that below, it has never addressed the growing controversy over the extent to which professionals may be subject to jurisdiction in multiple locales where their opinions, or the benefit of their services, may foreseeably be directed by their clients.

B. The Decision of the Michigan Court of Appeals Represents One Side of a Split Between the Federal Courts of Appeals.

1. Federal Courts of Appeals Declining to Exercise Jurisdiction Over Nonresident Professionals Rendering Professional Services Outside the Forum.

a. The Second Circuit

In *Leasco Data Processing Equipment Corp. v. Maxwell*, 468 F.2d 1326 (2d Cir. 1972), a securities fraud claim was filed in New York against a British accounting firm; the firm had audited financial statements of a British corporation that were incorporated into a draft annual report given to prospective purchasers of the corporation, who were residents of New York, but the firm had done nothing in the United States giving rise to the lawsuit. Anticipating *Asahi*, the court there stated that the exercise of jurisdiction over a defendant based upon acts outside the forum causing effects within the forum "must be applied with caution, particularly in an international context." *Id.* at 1341. Even accepting as true the plaintiff's assertions that the accounting firm must have known that its reports would be relied upon by any prospective purchasers, the court found the exercise of personal jurisdiction over the British accounting firm in New York to be inconsistent with due process:

> On that basis accountants operating solely in London could be subjected to personal jurisdiction in any country whose citizen had purchased stock of a company they had audited; the same would be true, of course, of accountants operating solely in the United States. Although such worldwide reliance may be, in a sense, foreseeable, it is not sufficiently

> so to constitute a basis of personal jurisdiction consonant with due process.

Id. at 1342. The court further pointed out that the foreseeability test for liability in tort should be distinguished from the test for personal jurisdiction, *id.* at 1341 & n.11, and that "the commercial loss suffered by a business from acts committed elsewhere is itself fortuitous, since the place of impact is ruled by the injured party's choice of place of doing business rather than the locus of activity directly traceable to the defendant." *Id.* at 1342 n.11. *See also Mayes v. Leipziger*, 674 F.2d 178, 185 (2d Cir. 1982) (based on long-arm statute, California law firm representing New York resident in California lawsuit was not subject to personal jurisdiction in New York).

The decision of the Second Circuit is squarely in conflict with that of the Michigan Court of Appeals.

b. The Eighth Circuit

In *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the Eighth Circuit declined to permit the exercise of personal jurisdiction in Minnesota over the Canadian partnerships of Peat Marwick and Deloitte & Touche. The plaintiff had alleged that these Canadian accounting firms had intentionally transmitted false financial reports concerning a Canadian company into the United States, knowing that such reports would be filed with the Securities and Exchange Commission and relied upon by investors in the United States. The plaintiff contended that the purposeful direction of even one false statement into Minnesota was sufficient to support jurisdiction there for claims arising out of that conduct. The Eighth Circuit rejected this argument:

> Like Touche Canada, Peat Marwick performed its audit work in Canada under Canadian accounting principles and auditing standards for its Canadian client. . . . Peat Marwick did nothing to "purposefully avail" itself of the privilege of conducting activities within Minnesota.

Id. at 1388. The Eighth Circuit has likewise declined to hold nonresident lawyers subject to suit in the forum on the grounds that they had represented forum residents. *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223 (8th Cir. 1987) (New York law firm representing South Dakota client in litigation in Maryland was not subject to suit in South Dakota).

These cases also conflict with the decision below.

c. The Fourth Circuit

Similarly in conflict with the Michigan Court of Appeals is *Young v. FDIC*, 103 F.3d 1180 (4th Cir. 1997), in which a prospective investor sought to finance the purchase of $600 million in oil and gas reserves through a company he believed to be financially sound based upon financial statements audited by Price Waterhouse-Bahamas stating that the company had a substantial deposit with a South Carolina bank. The Bahamian accounting firm, although part of a worldwide organization of separate and independent Price Waterhouse accounting firms, was organized in the Bahamas and had its principal place of business there. It had no offices, agents, employees, or property in South Carolina and had not engaged in any business there. The Bahamian accounting firm had sent an asset confirmation letter directly to the South Carolina bank holding the company's sole asset, but the firm's audit had taken place entirely in the Bahamas. The court held, "[T]he sole act of

using account information from [a bank] in South Carolina does not establish a 'substantial connection' between PW-Bahamas and South Carolina; nor does it constitute a purposeful availment of the privilege of conducting business in South Carolina." *Id.* at 1191 (citing *Burger King*, 471 U.S. at 475). The court similarly rejected the plaintiff's contention that Price Waterhouse-Bahamas should be subject to personal jurisdiction in South Carolina based on the foreseeability that investors would rely on its audit opinion, stating, "the Supreme Court clearly has held that 'foreseeability' alone is not 'a sufficient benchmark for personal jurisdiction under the Due Process Clause.'" *Id.* at 1192 (quoting *World-Wide Volkswagen*, 444 U.S. at 295).

d. The Sixth Circuit

The Sixth Circuit has also declined to exercise personal jurisdiction over nonresident professionals whose services rendered elsewhere had an effect on forum residents. In *Hatem v. Ark Oil Group, Ltd.*, No. 91-2251, 1993 U.S. App. LEXIS 23191 (6th Cir. Sept. 8, 1993), a Michigan resident entered into a partnership agreement with a Louisiana resident. The Louisiana resident's law firm, located solely in Louisiana and not licensed to practice law in Michigan, drafted a formal partnership agreement under Louisiana law and engaged in correspondence and telephone calls with the plaintiff in Michigan in the course of that representation. The court found that the Michigan resident's attempt to exercise jurisdiction over these Louisiana lawyers in Michigan would violate due process: "Appellees at no time availed themselves of the advantages of doing business in Michigan, as construed under the law. Their contacts with Michigan were purely incidental. They were Louisiana lawyers working for a local (Louisiana) client, and they were at most mailing or telephoning to

Michigan because that is where the investor was." *Id.* at *8. Consistent with this decision is another decision of the Sixth Circuit, declining to exercise jurisdiction over a Canadian doctor on long-arm statute grounds. *Rann v. McInnis*, 789 F.2d 374 (6th Cir. 1986) (Ontario physician who treated Michigan patient in Ontario held not subject to suit in Michigan).

e. The First Circuit

The Michigan Court of Appeals' decision also conflicts with the holding of the First Circuit Court of Appeals in *Sawtelle v. Farrell*, 70 F.3d 1381 (1st Cir. 1995). In *Sawtelle*, New Hampshire residents brought legal malpractice actions against their Florida and Virginia law firms and attorneys for inadequate settlement of a wrongful death action in Florida. Even though the defendants had knowingly rendered legal services to New Hampshire residents and allegedly directed negligent legal advice to their clients in New Hampshire, causing their clients' reliance and economic loss in New Hampshire, the court held that the defendants had not purposefully availed themselves of the New Hampshire forum and could not have reasonably foreseen that they could be held subject to suit there. "The mere act of agreeing to represent (and then representing) an out-of-state client, without more, does not suffice to demonstrate voluntary purposeful availment of the benefits and protections of the laws of the client's home state." *Id.* at 1394. The attorneys' legal services had been rendered elsewhere, and their only contact with the forum consisted of communications "with the clients in the state where they happened to live." *Id.* at 1391. The court was similarly unimpressed with the plaintiffs' argument that the attorneys and law firms, by cultivating their image on a national scale, had subjected themselves to suit in New Hampshire, considering this argument a variant on the "stream of

commerce" theory rejected by this Court in *Asahi*. *Id.* at 1393. *See also Kowalski v. Doherty, Wallace, Pillsbury & Murphy*, 787 F.2d 7 (1st Cir. 1986) (based on long-arm statute, Massachusetts law firm representing New Hampshire client not subject to suit in New Hampshire).

2. Federal Courts of Appeals Exercising Jurisdiction Over Nonresident Professionals Rendering Professional Services Outside the Forum.

Other courts, however, have followed the same school of thought adopted by the Michigan Court of Appeals, construing the law and facts to conclude that a nonresident professional's relationship with a forum resident of itself generates sufficient contacts to support the exercise of personal jurisdiction consistent with due process.

a. The Ninth Circuit

In *Hylwa v. Palka*, 823 F.2d 310 (9th Cir. 1987), the Ninth Circuit held that a Kansas accountant was subject to suit in California, even though the accountant's contacts with the forum state were the product of his client's unilateral decision to move there from Kansas. The court determined that because the accountant made annual trips to California in connection with his engagement and continued to benefit from ongoing performance of accounting services for his client after it relocated to California, the accountant should have reasonably anticipated being haled into a California court for claims arising from the services he performed for his client in Kansas. *Id.* at 314-15.

b. The Eleventh Circuit

Similarly, in *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253 (11th Cir. 1996), the court subjected Michigan attorneys and accountants to personal jurisdiction in Florida on the grounds that the defendants had rendered estate planning services to a Florida resident with specific reference to Florida law, knowing that the client's will would be probated in Florida, and directed mail and telephone correspondence to the client in Florida. The court held, "[t]he nature of the professional services rendered in this case was such that the defendants were fully aware that their actions or omissions would have a substantial effect in Florida. They should have reasonably anticipated the possibility of a suit arising from conduct directed towards the Florida Decedent." *Id.* at 259.

c. The Fifth Circuit

In addition, the Fifth Circuit exercised personal jurisdiction over a California doctor who had no contacts with Texas other than to have provided experimental drugs to a Texas patient that allegedly caused injury to the patient in Texas. *Bullion v. Gillespie*, 895 F.2d 213 (5th Cir. 1990). Those facts, combined with the presumed compensation for her services out of Texas and the presumed mail and telephone contact with the patient in Texas, made the exercise of personal jurisdiction over the California doctor in Texas both fair and reasonable. *Id.* at 217.

C. The Question Is Important and Should Be Settled.

This Court has always regarded with great seriousness the exercise of personal jurisdiction by a state over those who are neither residents nor citizens of it. *Asahi*, 480 U.S. at 114-15

("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in stretching the long arm of personal jurisdiction over national borders. . . . 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field'"). The importance of enforcing the Due Process Clause takes on added importance in politically or emotionally charged cases in which claimed damages are high. It is in just such circumstances that the protections afforded by the Due Process Clause must be most vigilantly enforced, as it is in those circumstances that the protections are most at risk.

These values are significant, but they are not the only impact of the Michigan Court of Appeals' ruling. As a practical matter, under the sweep of this decision and the other decisions like it, a professional firm may carefully structure its affairs so as to remain exclusively within one jurisdiction or, in this instance, one country, but the simple act of performing professional services for a multinational corporation will subject that same professional firm to suit anywhere the multinational corporation does business, regardless of the precautions the professional has otherwise taken to limit its jurisdictional exposure. Under this decision, a professional in effect appoints each of its clients its agent for service of process, wherever the client might be, and regardless of the professional's own conduct apart from accepting the client in the first place.

If E&Y-Canada were a manufacturer, and if this case were a products liability suit, the Michigan Court of Appeals could not have ruled as it did, because the conflict with this Court's rulings would have been direct and clear. What E&Y-Canada sells, however, is intangible. It sells a service. It is governed by laws, regulations and rules that limit the geographic scope of

its practice, but the clients it serves are not so constrained. As a result, E&Y-Canada performs services for its clients in Canada, but the effects of its services potentially may be felt wherever its clients happen to do business. No matter what efforts professionals may undertake to limit the geographic scope of their practice, under the reasoning of the Michigan Court of Appeals and the other federal circuits espousing that view, the only way an accounting firm can avoid being held subject to suit where its client wishes to do business is to refuse to render services to that client -- a result contrary to the public policy of Michigan and indeed of the United States generally.

While the principles articulated in *Hanson*, *World-Wide Volkswagen*, *Burger King*, and *Asahi* should be instructive of the proper analysis to use when evaluating whether to assert jurisdiction over nonresident professionals, this Court has never directly addressed the issue of how nonresident professionals fare in this increasingly service-oriented economy, in which technology has made interstate and even multinational commerce a routine occurrence. This case and the others cited involving accountants, doctors, and lawyers indicate the frequency with which this issue arises, as well as the confusion and divergence of opinion to be found in the courts faced with resolving it. It is highly important for professionals to know, with some degree of certainty, what conduct on their part will and will not subject them to personal jurisdiction in states where they have not rendered services but where it can be argued that their services may foreseeably have an effect.

CONCLUSION

For the foregoing reasons, E&Y-Canada respectfully requests that the Court grant a writ of certiorari to review the decision of the Michigan Court of Appeals.

Respectfully submitted,

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March 23, 1998

APPENDIX A

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

THE COMMISSIONER OF
INSURANCE OF THE STATE
OF MICHIGAN,

Plaintiff.

vs. File No. 95-80798-CZ

GEORGE R. ALBINO, et al.,

Defendant.
_____/

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE THOMAS L. BROWN,
CIRCUIT JUDGE, LANSING, MICHIGAN —
MONDAY, MARCH 18, 1996

APPEARANCES:

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ELIZABETH TANIS

Reported by: (Teresa J. Gallegos,) CSR-3445
Lansing, Michigan
March 18, 1996
at about 3:05 p.m.

THE COURT: The Insurance Commissioner of Michigan versus Albino, docket 80798. Motion for summary disposition. Mr. Alter?

MR. WALSH: Yes, Your Honor.

THE COURT: You may proceed.

• • • •

MR. RALLS: Yes, Your Honor, Bill Ralls of the law firm Butzel and Long appearing on behalf of Ernst & Young-Canada. It's my pleasure this afternoon, Judge Brown, to introduce the attorney who will argue our motion for summary disposition for lack of personal jurisdiction over Ernst & Young-Canada. We had filed a motion requesting the Court to

permit Elizabeth E. Tanis of Sutherland, Asbill & Brennan to appear pro hac vice on behalf of Ernst & Young-Canada in this action. Your Honor has entered an order already. Ms. Tanis is a member of the Bar of Georgia and I am pleased to have her here today to argue the motion on behalf of our clients.

THE COURT: Okay.

MS. TANIS: May it please the Court, as Mr. Ralls said, my name is Beth Tanis. I represent the Canadian --

THE COURT: How do you spell the last name?

MS. TANIS: T as in Tom, a-n-i-s. I represent the Canadian partnership of Ernst & Young as which I will be referring to as Ernst & Young-Canada.

As Mr. Ralls stated, we are here today on Ernst & Young Canada's motion for summary disposition for lack of personal jurisdiction. Your Honor, the personal jurisdiction inquiry is first and foremost a constitutional inquiry. Our argument unlike the officers and directors argument does focus more on the fundamental due process principles at work in any personal jurisdiction inquiry. Michigan, like every other state, does have a long arm statute for conferring personal jurisdiction over non-resident Defendants. But the Michigan Supreme Court has repeatedly held that the first inquiry must be whether personal jurisdiction exists under the due process clause of the United States Constitution. The constitutional analysis requires a Plaintiff to prove three things: There are three requirements. First, Plaintiff needs to prove that the non-resident Defendant has purposefully availed itself of the privilege of doing business in the State of Michigan. And that availment needs to be a deliberate undertaking such that is the non-resident Defendant

is enjoying the benefits of protection of Michigan laws. If the Plaintiff can establish purposeful availment, the Plaintiff must also prove a second requirement, due process, which is that the cause of action arose from the non-resident Defendants' contacts with the State of Michigan. And if the Plaintiff can prove this as well, Plaintiff still needs to show a third requirement, which is the Defendants' contact with the State of Michigan were so substantial that it's fair and reasonable under the circumstances to confer personal jurisdiction.

The focus on the constitutional analysis, Your Honor, is on the conduct of the non-resident Defendant who is contesting personal jurisdiction. The focus is not on that Defendant, co-Defendants. The focus is not on the Plaintiff, the focus is not on third parties. So in this case the focus must be on Ernst & Young-Canada's contracts with the State of Michigan.

Your Honor, I am going to describe for the Court some of the basic facts about Ernst & Young-Canada, that are relevant to the personal jurisdiction inquiry. All of the facts that I am about to tell the Court are substantiated by affidavits which we have filed in support of our motion. Virtually none of these facts has been refuted by the Plaintiff, and none of these facts has been refuted with any kind of evidence by the Plaintiff.

First, Ernst & Young-Canada's partnership is formed pursuant to the laws of Ontario Canada. It is a firm of chartered accountants. As the Court is probably aware, Canada does not have certified public accountants or CPA's as it has chartered accountants. Ernst & Young-Canada being sued in this Court on the basis of audit opinions that it issued with respect to the financial statements with Confederation Life Company or CLIC.

The first paragraph of Plaintiff's complaint allegation, appropriately and accurately, that CLIC is a Canadian Company. Ernst & Young-Canada's audit opinions on CLIC's financial statements expressly state that those audit opinions are based on Canadian audit standards on Canadian generally-accepted accounting principles and certain requirements of Canadian regulatory agencies. None of Ernst & Young-Canada's audit work for CLIC was performed in the State of Michigan. Not one piece of that audit work. Thus, Your Honor, what we have in this case is a Canadian accounting firm being sued for work it performed for a Canadian client, with that work performed pursuant to Canadian professional standards, and that work performed wholly outside the State of Michigan.

Your Honor, there is no case in the State of Michigan or elsewhere in this country that has found that personal jurisdiction under these circumstances may be confirmed within the confines of the due process clause of the Constitution.

THE COURT: It's possible this is the first, then?

MS. TANIS: Your Honor, there are cases that would say that this Court cannot confer personal jurisdiction over Ernst & Young-Canada and be within the confines of the due process clause of the United States Constitution.

In fact, we only have one case that we have been able to find anywhere in the country, which -- in which a non-resident Defendant who was being sued for work performed for a non-resident Plaintiff, which is what we have here, that's the 6th Circuit Court opinion in Hatim, in which we attached to our opening brief. In that case, Your Honor, the Court held that personal jurisdiction could not attach to that case. That the

minimum contacts required by the due process clause were not present. That is the only case that we have been able to find where you have an out-of-state professional Defendant and an out-of-state client.

Your Honor, with respect to the Ernst & Young-Canada engagement themselves that are at issue in this case, those engagements came about because CLIC, as a Canadian company, is heavily regulated by Canadian statute and by Canadian regulatory agencies. One of the Canadian statutory requirements for an insurance company in Canada is that CLIC would have its financial statements audited annually by a firm of chartered accountants pursuant to Canadian accounting standards.

As I stated earlier, Ernst & Young-Canada is a firm of chartered accountants. It has its principal office in Toronto, Canada. In accordance with the Canadian law governing CLIC, CLIC engaged Ernst & Young-Canada to audit its financial statements in accordance with Canadian GAAP. Canadian-GAAP is different, Canadian accepted accounting principals are different than United States general accounting principles. CLIC engaged these engagements in terms of Toronto. The terms of engagements were to be in Toronto. Ernst & Young of Canada issued its engagement letters from Toronto offices, no portions of audit ordered pursuant to Michigan accounting standards. In fact, Michigan professional standards concerning certified public accountants at that time provided only accountants in State of Michigan practice only in the State of Michigan. Ernst & Young's not licensed to practice in the State of Michigan.

Ernst & Young-Canada supervised audits of CLIC from its Toronto offices. Ernst & Young-Canada was paid in

Toronto by CLIC from CLIC Toronto offices. All payment for these audits was in Canadian currency, not US currency. Ernst & Young-Canada received no portion of its audit fees for CLIC from the State of Michigan, or from any Michigan residents.

It is indisputed in this case, Your Honor, that Ernst & Young-Canada did not send its audit opinions to anyone in the State of Michigan, including the Michigan Insurance Bureau, nor did it send any information, financial information about Confederation Life to anyone in the State of Michigan. In addition to, contrary to what Plaintiff suggested in his brief in opposition to our motion, Ernst & Young-Canada, in its audit opinions, were not addressed to anyone in the State of Michigan. They were addressed to policyholders and directors, but they did not target anybody in the State of Michigan.

Your Honor, Ernst & Young-Canada also did not solicit any business in the State of Michigan. It does not advertise in the State of Michigan, and does not ask for Michigan residents to be its clients.

In short, and with respect to these audit engagements that are at issue here, none of the Ernst & Young Canada professional work performed in the State of Michigan or performed pursuant to any Michigan professional standards, none of the payments for those engagements came from the State of Michigan. Piersons (sp) and Sons didn't send audit opinions in the State of Michigan, and those services were performed for a non-Michigan resident, that is CLIC.

Your Honor, I would like to describe, very briefly, Ernst & Young-Canada more generally, not just in the context of these engagements. Ernst & Young-Canada, as I said, is a Canadian partnership. Canadian professional rules governing

chartered accountants prohibit anyone who is not a chartered accountant from being partner of the Canadian accounting firm. By the same token, Michigan professional rules prohibit anyone who is not a certified public accountant in the State of Michigan from being a partner of an accounting firm that practices in the State of Michigan.

Ernst & Young of Canada has no partners or employees in the State of Michigan. It has no registered agent for services processed in the State of Michigan. It has no offices in the State of Michigan. It has no real estate in the State of Michigan. It has no personal property in the State of Michigan. It does not maintain any books, records, or bank accounts in the State of Michigan. And, as I stated before, it does not solicit or advertise in the State of Michigan. Given the collaboration of contacts between Ernst & Young-Canada and the State of Michigan, this Court cannot confer personal jurisdiction within the confines of the due process clause of the United States Constitution.

I would like to talk first, and this will be where most of my argument plays on the first requirement of the due process analysis, which is that the Defendant must have purposefully availed itself of the privilege of doing business in the State of Michigan. Unless the Plaintiff can establish this, the personal jurisdiction inquiry ends. Because that is a requisite to personal jurisdiction.

Your Honor, there is no case that has found that with a Defendant, a non-resident Defendant who is a professional, there is no case found that that foreign resident Defendant is subject to personal jurisdiction under circumstances like this case. Our brief cites several cases to the Court, and the Plaintiff has not come up with any case, apparently has also been unable

to find any case that under circumstances like this which confer personal jurisdiction.

Under Michigan law, a non-resident Defendant who is providing professional services subject to the personal jurisdiction of this Court, is only under two circumstances. One is if the non-resident professional has actively negotiated the retainer agreement in the State of Michigan. The other circumstance is until the non-resident Defendant has actively solicited through advertising or some other means, clients in the State of Michigan, neither of those requirements has been met here.

Your Honor, it is undisputed that this engagement letter was negotiated in Toronto, Canada, not in the State of Michigan. It is also undisputed that there is no soliciting or advertising in the state of Canada.

In addition, Your Honor, this case is lacking two of the fundamental requirements that you see in virtually every single personal jurisdiction case involving non-resident Defendants. We do not have a Michigan clients. In this case CLIC is a Canadian company. We also do not have a non-resident Defendant professional obtaining any of its fees for the professional services from the State of Michigan.

THE COURT: Well, this Ernst & Young in Canada, what do they audit, or it audits? Did it audit the business of Confederation Life in Michigan or United States?

MS. TANIS: It audited over all the financial statements of the company.

THE COURT: So it engaged itself in auditing the business of Confederation Life of the United States?

MS. TANIS: Yes. It included in those audits. But that alone is not sufficient, Your Honor.

Let me describe ---

THE COURT: I am not saying it is. But that was what they did, right?

MS. TANIS: They did do that.

THE COURT: So it's Mr. Walsh's contention that that wasn't an accurate portrayal of its business of the company, financial help of the company? If they are not responsible, who is?

MS. TANIS: Well, Your Honor, the issue is not ---

THE COURT: I mean, Ernst & Young-Canada did the audit. They audited the business of the Confederation Life of the United States.

MS. TANIS: But, Your Honor, the critical inquiry is what contacts did Ernst & Young-Canada have with the State of Michigan. Merely because the company might be doing business in several jurisdictions does not mean Ernst & Young-Canada can be hauled into court in every jurisdiction in which the company did business.

THE COURT: You have a rather unusual circumstance. We have something totally unlike everything else.

MS. TANIS: Your Honor, we have a situation where we have a non-resident professional. In that situation, this is not a unique circumstance.

If I may, Your Honor, perhaps I could describe a couple of the cases having to do with professional services. The first case is a Michigan appellate Court case, which is the case of Woodward versus Keenan. And in that case a Michigan resident obtained services from an Indiana physician. And she went to Indiana, and the physician diagnosed her condition. The Indiana physician obviously knew that he had a Michigan patient. He diagnosed her condition. And then he sent a letter to her personal treating physician in the State of Michigan so he directly sent the letter into the State of Michigan describing the diagnosis. In that diagnosis, he failed to diagnose a brain tumor that this patient had. And even with those contacts of actually having a Michigan client, and mailing the diagnosis into the State of Michigan, Plaintiff then claimed that she had relied on that diagnosis by failing to get surgery in time.

Even with those types of substantial contacts with the State of Michigan, the Michigan appellate court said that the cases are uniformly rejected, a finding of personal jurisdiction would exist under those circumstances. So the mere awareness that the professional is auditing or treating someone who may have some contact with the State of Michigan is not adequate. The Michigan Supreme Court has stated in the Khalaf opinion that we have cited in our brief, just because somebody knows that one of his clients may be doing business in the State of Michigan is not adequate. Because that's the wrong focus. The focus needs to be on the contacts between Ernst & Young-Canada and the State of Michigan.

Your Honor, for this Court to confer personal jurisdiction in this case would be unprecedented, and would extend motions of personal jurisdiction beyond what any Court to date has been willing to do.

The case law is substantially against the Plaintiff on this point. So what does the Plaintiff do? Well, the Plaintiff's major argument, again, confers personal jurisdiction in this case, is to argue Ernst & Young, one worldwide firm. Not suing Ernst & Young of Canada, suing one worldwide firm suing Ernst & Young of the United States partnership. In that sense, trying to get jurisdiction by saying Ernst & Young consists of both the United States components and Canada components, there is, however, no worldwide firm. The Plaintiff can say all he wants, but it is his burden of proof to come up with any evidence to show existence of a worldwide firm.

THE COURT: So there is a question of fact whether there is a worldwide firm?

MS. TANIS: No, Your Honor. I don't believe there is a legitimate question of fact. We have provided evidence to the Court with the form of affidavits showing that Ernst & Young-Canada is a separate and distinct partnership, that has no partners or employees in common with the United States firm, that there is no sharing of profits or revenues, that neither firm has any say in the management or inquirations of the other firm.

In fact, Your Honor, by virtue of both Canadian professional rules, and Michigan professional rules, Ernst & Young-Canada, and Ernst & Young the United States firm, cannot be partners with each other, because the rules prohibit that. We have a legal prohibition against the very argument that

Plaintiff is making. Your Honor, the Plaintiff has made this argument twice in this case already. It has been flatly rejected twice in this case. He made the argument first to Magistrate Judge Rowland in arguing that there was no federal court jurisdiction. Magistrate Judge Rowland flatly rejected it, said there are two distinct entities, there is a US firm, a Canadian firm. In fact, Judge Rowland said once Plaintiff found out the true nature of these firms, the Plaintiff went out and served the United States firm. The Plaintiff then tried to make the exact same argument to Judge Enslen in federal court.

THE COURT: Neither one of those judges have this case anymore, right?

MS. TANIS: No, Your Honor. I am using this for —

THE COURT: I wish they had kept it. Maybe that's why they got rid of it.

MS. TANIS: It may be, Your Honor.

THE COURT: They didn't wants to set any precedence.

MS. TANIS: Well, Your Honor, they didn't really need to set any precedence. Because on this point, other courts in the country have set precedence. In fact, other Courts that has decided this issue worldwide firm corporation decided the issue against the Plaintiff is taking the only thing Plaintiff proffers to the Court, the worldwide firm theory part of a marketing brochure, describing Ernst & Young as a worldwide professional firm. Many courts have decided this issue in the country.

THE COURT: I recall, Mr. Walsh, last week, you wanted a whole bunch of their brochures, is that Ernst & Young?

MR. WALSH: I don't know, you know, some of them say Ernst & Young.

THE COURT: You are not the lawyer that wanted a bunch ---

MR. WALSH: Oh, I did, I did. I think they are going to be produced, for some reason, in camera.

THE COURT: That's in another case?

MR. WALSH: No, that's another Defendant. I guess they don't want the world to see them, so they are going to be produced in camera.

THE COURT: I am sure I am going to be enthralled looking at them. I always put the mute button on my TV when the ad comes on.

MS. TANIS: In any event ---

THE COURT: Sorry to interrupt.

MS. TANIS: No, that's fine. Of course, if you have any questions, I would rather answer your questions than just talk at you.

In any event, there is no worldwide firm tacitly conceding this point. If you look at Plaintiff's brief in opposition to our motion, the lionshare of the Plaintiff's argument, based on the

assumption Ernst and Young-Canada is, in fact, a separate and distinct entity.

With respect to Ernst & Young-Canada to being a separate and distinct entity, Plaintiff has basically two arguments beginning with our statement of if were fully availing ourselves of doing business in the State of Michigan, the first suggestion in Plaintiff's brief in opposition, to tell you what I have outlined, in fact, in this case are not facts, Ernst & Young-Canada have had more contacts in the State of Michigan than what we have said. Essentially what Plaintiff says in his brief, Ernst & Young-Canada directly send audit opinions in the State of Michigan. Your Honor, we submitted an affidavit, in fact, two affidavits that state Ernst & Young-Canada did not send those audit opinions into the State of Michigan. The Plaintiff has zero evidence. And I challenge the Plaintiff to come up with it today, if he has got it.

THE COURT: Is it a requirement that someone submit them to the Insurance Commission?

MS. TANIS: Your Honor, it is not a requirement on Ernst & Young-Canada.

THE COURT: Well, Ernst & Young supplied them for Confederation Life. Then may we assume Confederation Life supplied them with the Insurance Commission?

MS. TANIS: Presumably if they were supplied through the Insurance Commissioner through Confederation Life, but Ernst & Young audited Canadian CLIC pursuant to Canadian statutory requirements through the financial statements.

THE COURT: I understand. That's the audit that Confederation Life relied upon to submit to the Michigan Insurance Commissioner.

MS. TANIS: If they were submitted, it was submitted by CLIC.

THE COURT: If they did.

MS. TANIS: Your Honor, however, again, the focus must be on the Defendant who is challenging jurisdiction. And even, Your Honor, even if Ernst & Young-Canada had sent its audit opinions directly to the State of Michigan, that would not be good enough. And the Michigan appellate courts has already told us that in the Woodward opinion, that's the case with the Indiana physician sending a letter directly to the State of Michigan, contains the very diagnosis that the Plaintiff claims should be relied upon to her entry into the State of Michigan. So there isn't any evidence Ernst & young-Canada sent those audit opinions into the State of Michigan. Even if there were, the Michigan appellate court already said that is not a sufficient basis for personal jurisdiction.

The Plaintiff's next argument, only other argument against the purposeful availment cause of action analysis to say it is foreseeable to Ernst & Young-Canada that is audit opinions might make their way into the State of Michigan. Your Honor, Mr. Alter has already referred the Court to the Asahi case, but that case, as well as the United States Supreme Court decision in Burger King upon which Plaintiff relies, various Michigan Supreme Court cases and various appellate court cases all uniformly hold that mere foreseeability that your conduct may have an effect on in the forum state, cannot, as a matter of constitutional law, cannot confer personal jurisdiction on the

Defendant. That is Black Letter Constitutional Law. I was surprised that the Plaintiff did not cite that.

THE COURT: You mean to tell me that Ernst & Young, doing audit of a business, of a company, a company that does business in the United States, has no reason to assume that that audit might go to that foreign country?

MS. TANIS: Your Honor, what I am saying even if Ernst & Young-Canada had a reason to assume it might go there, that as a matter of Black Letter Law, the Untied States Supreme Court law, Michigan Supreme Court law, that is an insufficient contact to confer personal jurisdiction. The Supreme Court of the United States and Michigan have said that over and over and over again. Foreseeability, even if the Defendant says, yes, I foresaw that it was going to go there, is inadequate, is a matter of law.

Your Honor, the second requirement ---

THE COURT: You see, what you have here, something that's a little bit different than conferring jurisdictions for purposes of liability and damages and the like. What is proposed here, the Rehabilitator is trying to gather together the assets of this company and the Rehabilitator believes that Ernst & Young had something to do with the diminution of those assets by improper audits, et cetera, et cetera. And these directors and officers and people like that had some direct inquiry in the diminution of the assets in the company. All the Rehabilitator wants to do, get all the money together that he can so that the policyholders, persons who paid premiums over years and years to Confederation Life, are somewhat made whole. That's a little bit different than suing

someone for some personal liability under a tort theory, or something of that sort.

MS. TANIS: Your Honor, I understand the point that you are making, it is, however, not that is a proper ground for conferring personal jurisdiction. The Insurance Commissioner is not above the constitutional requirements of the United States Constitution just because he is an Insurance Commissioner.

THE COURT: I understand the president is not either.

MS. TANIS: That's correct, Your Honor. It doesn't matter what his intent is in pursing or what he hopes to accomplish in his lawsuit. The point is, if there isn't personal jurisdiction, he is going to have to go get that relief against Ernst & Young-Canada.

THE COURT: I don't know what Mr. Walsh wants to get from Ernst & Young. What are you exactly looking for from Ernst & Young, Mr. Walsh?

MR. WALSH: Money.

THE COURT: You are looking for money?

MR. WALSH: Yes.

THE COURT: You wants to then respond in damages?

MR. WALSH: Yes, to the harm they have caused.

THE COURT: Along with these directors and officers?

MR. WALSH: Excuse me. The Ernst & Young ---

THE COURT: Yeah, well, Confederation Life and Mr. Alter's clients. It's all one ball of wax. He wants some money from all these folks so you can gather all the assets together. And this money, this response to damages is part of this ball of wax money.

MR. WALSH: Yeah. About a billion dollars, Your Honor.

MS. TANIS: Your Honor, in that sense, this Plaintiff is not particularly different than any other Plaintiff. However, again, that is not the relevant inquiry. If that could be the relevant inquiry, it would turn due process and constitutional principals on their head. Where the inquiry is the Defendants' contact with the State, the Commissioner, as he is trying to do right now in Ontario, can go to Ontario, get relief against Ernst & Young-Canada. This is not a situation where the Commissioner is without any jurisdiction with which to get that relief. He can't just decided to sue in the State of Michigan to ignore the constitutional limitations and just go after Ernst & Young-Canada because he has what he believes a good cause to do it. The due process clause of the constitution, Your Honor, protects all Defendants, whether those Defendants are good, bad or indifferent. And the level of culpability that has been alleged is utterly irrelevant as it must be to this constitutional inquiry.

Your Honor, very briefly, there are two other things besides purposeful availment that the Plaintiff has to prove in this case to get jurisdiction. The second prong of constitutional analysis, whether the cause of action arose from the Defendants' contacts with the forum state. That's impossible here, because none of the audit work was performed. Ernst & Young-Canada is being sued for its audit work for CLIC, none

of that audit work performed in the State of Michigan. So the cause of action could not have arisen through Ernst & Young's contacts in the State of Michigan for which there were none.

The third prong, whether the Defendants' contacts are so substantial within the State of Michigan that it would be fair and reasonable to exert jurisdiction. There is really a requirement that assumes in many ways, that the Plaintiff has been able to establish purposeful availment. Plaintiff has be able to establish that the cause of action arose from the contacts. But for some other reason, it would be unfair to exercise jurisdiction of the Defendant.

Mr. Alter has already alerted the Court to the Asahi opinion. I won't belabor the point. But where the United States Supreme Court requires, and as does the Michigan Court, require the Court to consider that this is not just a non-resident Defendant, but this is a foreign Defendant, which creates additional significant burden, particularly, for the accountants, Your Honor, who have their own professional standards in Canada, who must comply with a totally different set of standards that apply in the United States.

My last point, Your Honor, again, is to make a point that at least if Plaintiff's brief in opposition is any indicator what Plaintiff will argue to the Court, Ernst & Young of Canada did something bad here. Ernst & Young of Canada should be able to be sued. I am hopeful and confident that this Court would not prejudge Ernst & Young-Canada at this point. But in any event, that argument is utterly irrelevant to the due process analysis. Ernst & Young-Canada, like everybody else, Defendant is entitled to the protection of the due process clause. Thank you, Your Honor.

THE COURT: Mr. Walsh?

MR. WALSH: Thank you, Your Honor. Let's correct a few things. First off, one, Ernst & Young did work for a Michigan resident. The legislature has declared that an alien insurer, using Michigan as its state of entry, is domiciled here. Domicile means a resident of Michigan. So what we have is, Ernst & Young misrepresenting the financial status of a Michigan resident. Let's get something else straight, Magistrate Rowland did not say that Ernst & Young-Canada and Ernst & Young-US and Ernst & Young-UK didn't come together to do this audit. You have got a wonderful straw man. They are separate partnerships, US, Canada, UK. That doesn't tell us anything, Your Honor. That's like saying you are a separate individual from Judge Giddings, who is a separate individual from Judge Collette. But when I talk about the Ingham County Circuit Court bench, I refer to all of you.

Your Honor, in 1992 and 1993, Ernst & Young made an audit proposal to Confederation Life. We have attached a copy. And in it, it talks about our Atlanta office doing certain work. It talks about our UK office doing certain work. And you can read the entire document, Your Honor. It never says Ernest & Young-Canada, it talks about three, maybe distinct partnerships. But three locations, coming together to do an audit.

And what you have got here, Your Honor, is the first step of a shell game. Because Mr. O'Ragan, with who is a Canadian partner for Ernst & Young, says the US branch, that's the problem you have got. You have got this US branch in rehabilitation. That audit was done by Ernst & Young-US. Ernst & Young-US says we are subject to your jurisdiction, Your Honor. But we didn't sign the audit opinion. That's those Canadians. Now, these folks can come together, they can lock

arms when it comes to soliciting business, when they describe to Confederation what they are doing, you have got US, UK and Canada all arm and arm. They make a joint proposal, and they go ahead and do the work. Which, when it comes time to ask someone to answer for poor work, for devious work for misleading people, they all go. I have nothing to do with that fellow.

Your Honor, that's not what they tell the world constantly. Here is a brochure, you can go to the Ernst & Young officers here in Detroit, Kalamazoo, pick it up. It talks about, this is page two, our North American offices assisted in an acquisition of a Canadian-owned retail business in the United States. North America means, to me, Canada, US, maybe Mexico.

I go to page eight, the multi-national Ernst & Young team included in international tax professionals with the understanding of the financial services regulations from the United Kingdom, United States, Japan, Hong Kong and Australia.

I go to page 11, immediately a team of management level auditors from Ernst & Young, officers of Western Germany, the United Kingdom and United States moved into the East German locations. Here they did the same thing. They got a team. The team is described in their audit overview. People are named from Atlanta. That's the US member of the team from Toronto the Canadian member of the team from the United Kingdom. They come together and do a job. They do it poorly, but they say, oh, please doesn't make me come to court in the United States, and I am going to divorce myself from my team member when there is a problem. They did extensive work for a US resident, a Michigan resident, and they did it poorly.

Now, what do they say in that audit overview, audit objective, in accepting the audit engagement of Confederation Life Insurance Company? The company, we assume a responsibility to the policyholders, Your Honor, there are 200,000 policyholders in the United States. The legislature has said the representative of that policyholder is the Commissioner of Insurance. And, yet, someone stands in front of you today and says it would violate due process to make them come and answer to the statutory representative of the policyholders to whom they undertook a responsibility.

Every year their audit opinion is in the annual statement. It's addressed, not to Canadian policyholders, it says to the policyholders and directors of Confederation Life Insurance Company. It didn't say to the Canadian policyholders, it said the policyholders.

Your Honor, there is a simple question. If a Michigan domiciled insurance company, and the problem that Confederation Life is in, can't call its auditor to task in Michigan. Where can they call that auditor to task, Arizona, New Mexico, Florida?

THE COURT: Canada.

MR. WALSH: That's what they are saying. They are saying weekly to 200,000 people in the United States we can tell them that everybody is rosey with this company, when this company is hemorrhaging. But don't dare ever ask us to be responsible for our lives in the United States Court. That's outrageous, due process.

THE COURT: You could see, sue them in Canada.

MR. WALSH: Yes, but I don't have standing, the Commissioner doesn't have standing to represent policyholders in Canada. What they are saying is, all 200,000 policyholders can go up and make their claims. And if they didn't want to be sued in the United States, then they should have refused to do work for an insurance company where two-thirds of its business was in the United States.

And Your Honor, hit the nail on the head when you asked Ms. Tanis, oh, you didn't lick the stamp on the envelope that sent your audit to Michigan. No, they didn't lick the stamp. But they gave their clients, Confederation, a letter saying we are aware of requirements in Michigan law, and we are letting you send our opinion to the Commissioner. Because if the Commissioner did not get an audited opinion from Ernst & Young, CLIC would have been out of business in the United States.

Chapter 10 of the Insurance Code specifically requires that an alien insurer, such as CLIC, file with the Commissioner the opinion of its auditor, and Ernst & Young knew that its opinion was gong to be filed. Exhibit I to our motion is their letter. And they wrote the Board of Directors, said, send our opinion of Confederation's status to Michigan. If they couldn't have done that, if they could have not given that awareness letter, is there any question that they would have lost this million and a half dollar a year client? Confederation was not going to hire an auditor that would not agree that its opinion could be sent to Michigan. They knew their opinion was going to Michigan. They knew the Michigan Insurance Bureau was going to rely on it. They knew that Michigan was the domicile, the residents, in the United States of their clients.

A few other things that have to be cleared up, Your Honor. This notion that Ernst & Young-Canada, if we split these folks apart, that Ernst & Young-Canada doesn't exist in Michigan. Somebody picked up this brochure just the other day, Ernst & Young Consulting Services, back page, Canadian locations. Well, we just heard that US accountants can't practice in Canada. Canadian accountants can't practice in the US. What is this Canadian location for except trying to drum up business?

This is the tax guide, Your Honor, we have got several pages, names and phone numbers of Canadian accountants. You can pick this up in Michigan. They may not be a worldwide firm, they may only come together on occasion as teams as they did here. But its ridiculous for Ms. Tanis to get up and say that her client doesn't advertise in Michigan.

Your Honor, due process definitely allows this Court to exercise jurisdiction over an accounting firm that knows its opinions are going to be sent to the Michigan Insurance Bureau, relied on by the Michigan Insurance Bureau, knows that its opinions are going to be relied on by policyholders, who unfortunately for Your Honor, all come before you. You have got to deal with these policyholders in the United States. And, again, they took on a responsibility to the policyholders, and Ms. Tanis didn't tell you of one case where someone said, I take on an express response to someone. But when it comes time to answer for that responsibility, watch out, I am running away. I won't go where the recipients of my client lives. They caused enormous consequences in Michigan. They had enormous contact in Michigan. They sent false statements to Michigan repeatedly. And we are only here asking them to answer for those statements, Your Honor. This rehabilitation can't go forward, and the legislature's scheme for dealing with

alien insurers would collapse if accountants for alien insurers could come here and say, I told you, I helped my clients get into the State of Michigan, which enabled them to do business throughout the United States. I helped my client misrepresent its financial condition to the Michigan Insurance Bureau. But when the problem comes, when it's crunch time, oh, you will never see me crossing the border, all of my shenanigans, all of my wrongdoings, I did out of Toronto. I have duped you, Michigan official. I have duped out, Michigan policyholders. But so what? That's not due process, that couldn't be due process. Thank you.

THE COURT: Anything further?

MS. TANIS: Your Honor, just a few points of clarification.

First, Mr. Walsh apparently is of the view, as long as there is joint and several liability among two separate partnerships, somehow you could just create association out of thin area and then say, gee, that Defendant that I otherwise would not have had jurisdiction over, I have got jurisdiction over just by virtue of joint and several liability. Due process clause does not work that way.

Additionally, as Magistrate Judge Rowland found, the only worldwide Ernst & Young entity, a company by the name of EYI, not an accounting firm, but rather is an international organization to which the Ernst & Young firms belong, Mr. Walsh has misrepresented to Your Honor what this awareness letter is in Exhibit I. It does not say anywhere in it that Ernst & Young knows that CLIC is going to be sending the audit opinions to the State of Michigan. What it says, this letter is furnished solely for you, that is CLIC is to comply with Section

901 of the Michigan Insurance Code and should be used for no other purpose. It does not say anything about, you can go ahead and send that to the State of Michigan.

The marketing brochure that Mr. Walsh has apparently picked up from somewhere, there is no evidentiary basis for it, picked up from somewhere. Of course, he has not provided it to us. What I hear him say, it's Ernst & Young consulting group that would be a separate partnership, that is not the Defendant that is even being sued. Can Mr. Walsh go to Canada and sue Ernst & Young in Canada? The answer is yes. Just because he doesn't have standing to represent the Canadian policyholder does not mean he would not have standing in Ontario to represent the US policyholders, assuming he would have that standing in the United States, of course, that issue would be in dispute.

In fact, Your Honor, he is trying, he has asked the Ontario court to allow him to assert claims in Ontario. There is another jurisdiction by which he could assert these claims against Ernst & Young-Canada. Your Honor, I do have a notebook of cases, the main case upon Ernst & Young-Canada relies, if I may give them to your law clerk for the Court's review. I should have done this at the beginning of my argument, but I didn't.

In conclusion, we ask the Court to grant Ernst & Young's motion for summary disposition under lack of personal jurisdiction.

THE COURT: Well, the Court's inclined to agree with Mr. Walsh that this company in Canada, albeit a separate entity of Ernst & Young in the United States to Ernst & Young-UK, which is the United Kingdom, something of that sort, they did audits of this company regarding their business in the United

States, including the State of Michigan. I think they have every reason to believe that that audit is going to come to the attention of the Insurance Commissioner in the State of Michigan, who is supervising their activities in this country through the State of Michigan. And they have every reason to believe that that ought to be accurate. If it's not, they ought to be able to respond. I am going to deny the motion.

MR. WALSH: Thank you, Your Honor.

THE COURT: Will you prepare the order on that?

MR. WALSH: Yes, Your Honor. . . .

APPENDIX B

STATE OF MICHIGAN

IN THE CIRCUIT COURT
FOR THE COUNTY OF INGHAM

IN THE MATTER OF
REHABILITATION OF THE
CONFEDERATION LIFE
INSURANCE COMPANY IN
THE UNITED STATES
(Case No. 94-78300-CR)

_____/

THE COMMISSIONER OF
INSURANCE OF THE STATE
OF MICHIGAN
Plaintiff,

-v-

Ingham County Circuit Court
Case No. 95-80795-CZ
HON. THOMAS L. BROWN

GEORGE R. ALBINO, ET AL
Defendants.

_____/

ORDER

At a session of said Court, held in the City of Lansing, County of Ingham, State of Michigan on 4-1-96

PRESENT: _____
CIRCUIT COURT JUDGE

The Court having reviewed the motion filed by the Canadian partnership practicing under the Ernst & Young name ("Ernst & Young-Canada") for summary disposition for lack of personal jurisdiction and the briefs in support and in opposition, and after having heard the arguments of counsel, for the reasons stated on the record, it is hereby ordered that the motion is denied.

Thomas L. Brown
CIRCUIT COURT JUDGE

Approved as to form:

BODMAN, LONGLEY & DAHLING LLP

By: /s/
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APPENDIX C

STATE OF MICHIGAN
COURT OF APPEALS

COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

GEORGE R. ALBINO, WILLIAM H. ALEXANDER, JOHN D. ALLAN, WILLIAM BENTON, CONRAD M. BLACK, BENNETT A. BROWN, PATRICK D. BURNS, PAUL G. S. CANTOR, WILLIAM D. DOUGLAS, MARK E. EDWARDS, KENNETH E. FIELD, NAN-B DE GASPE BEAUBIEN, IRVING R. GERSTEIN, ANTHONY F. GRIFFITHS, SIR ANTHONY S. JOLLIFFE, THOMAS E. LADNER, GEORGE E. MARA, ROBERT W. MARTIN, DAVID MCCAMUS, DARYL E. MCLEAN, ANDRE MONAST, MICHAEL REGESTER, JOHN RHIND, MICHAEL ROSENFELDER, BORDEN D. ROSIAK, MICHAEL J. WHITE, ADAM H. ZIMMERMAN, HARRIS TRUST AND SAVINGS BANK,

FOR PUBLICATION
September 30, 1997
9:00 a.m.

No. 194261
Ingham Circuit Court
LC No. 95 80798 CZ

ERNST & YOUNG LLP,
Defendants,

ERNST & YOUNG-CANADA,
Defendant/Appellant.

Before: Jansen, P.J., and Saad and M.D. Schwartz,* JJ.

SAAD, J.

I

Nature of the Case

This case arises out of the financial collapse of Confederation Life Insurance Company ("CLIC"), the largest insurance solvency in North American history.

A foreign corporation, Ernst & Young of Canada ("E & Y-Canada") challenges the Michigan courts' power to adjudicate a breach of contract and tort case brought against it by the Michigan Commissioner of Insurance ("Insurance Commissioner" or "IC"). The IC charges E & Y-Canada, as the public auditor of CLIC, with breach of contract, professional malpractice and with fraud in submitting fraudulently deceptive and misleading audits to the IC. E & Y-Canada's audits allegedly concealed the wrongful removal by CLIC of six hundred million dollars from a trust required by Michigan law

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* Circuit judge, sitting on the Court of Appeals by assignment.

to be held for the benefit of, among others, Michigan policyholders of CLIC.

E & Y-Canada says that it has no physical presence in Michigan, and that Michigan courts lack jurisdiction to adjudicate the IC's claims against it because it lacks sufficient contacts or other nexus with Michigan. The IC, on the other hand, says that Michigan courts may exercise limited personal jurisdiction[1] over E & Y-Canada consistent with Michigan's long-arm statute and the Due Process Clause of the United States Constitution. The IC rests his jurisdictional case primarily on his allegation that E & Y-Canada knew that its fraudulently deceptive audits would be submitted to and relied upon by the IC and Michigan policyholders. The IC further supports its assertion of personal jurisdiction on the grounds that: (1) CLIC is a Michigan resident by virtue of using Michigan as its state of entry to do business in the United States, (2) E & Y-Canada knew its audit of CLIC was a statutory predicate to CLIC doing business in Michigan and the United States, and that (3) E & Y-Canada conducted its 1991, 1992 and 1993 audits with this Michigan corporation with full knowledge of applicable law regulating the insurance industry, and with knowledge of the catastrophic losses its accounting practices would cause Michigan residents/policyholders.

The circuit court held that it has jurisdiction to hear the IC's case against E & Y-Canada. In this interlocutory appeal, we affirm and remand for further proceedings.

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[1] We use the terms "personal jurisdiction" and "*in personam* jurisdiction" interchangeably in this opinion.

II

Facts

CLIC, which is not a party to this matter, was a mutual insurance company organized under the laws of Canada, with its principal office in Toronto, Ontario, Canada. CLIC did business in Canada, Michigan, the United States and the United Kingdom. Since 1964, Michigan has been the "state of entry"[2] for CLIC in the United States.

Michigan's insurance code permits an alien insurer to use Michigan as a "state of entry" to conduct business throughout the United States by qualifying as an insurer here; this process requires an alien insurer to establish a trust account and provide extensive documents and records to the IC. MCL 500.431a-c; MSA 24.1431(a)-(c). The purpose of the trust account is to ensure that, if the insurer becomes insolvent, there will be sufficient assets available in the United States to satisfy United States' policyholder claims. The Insurance Commissioner is the primary regulator of alien insurance companies (including CLIC) which operate in Michigan. See MCL 500.222-.224; 500.403, 500.404, 500.411; MSA 24.1222-.1224; 24.1403, 24.1404, 24.1411.

In August 1994, the Superintendent of Financial Institutions Canada (CLIC's primary Canadian regulator) took control of CLIC's assets, pursuant to the Canadian Insurance Companies Act. Liquidation proceedings are ongoing in Canada. On August 16, 1994, an order of rehabilitation was entered in Michigan, in favor of the Michigan Insurance Commissioner, CLIC's primary U.S. regulator. See

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[2] See MCL 500.431a; MSA 24.1431(a).

Commissioner of Insurance v Arcilio, 221 Mich App 54, 57; 561 NW2d 412 (1997).

Defendant E & Y-Canada is a partnership of Canadian chartered accountants (the Canadian equivalent of CPAs) headquartered in Toronto. E & Y-Canada audited the financial statements of CLIC for 1991, 1992 and 1993, and gave a favorable opinion regarding CLIC's financial position. That opinion was contained in a letter to CLIC's policyholders and directors which appeared in CLIC's annual statements. E & Y-Canada has never done business in Michigan, has no employees or property in Michigan, and has provided no auditing or accounting services in Michigan. CLIC engaged E & Y-Canada in Canada and paid E & Y-Canada in Canada. E & Y-Canada never directly sent any of its audit opinions or reports to anyone in Michigan, including the Michigan Bureau of Insurance. Yet, it knew that its audit opinions would be sent to and relied upon by the IC and Michigan policyholders.

The Michigan insurance code requires insurers (including alien insurers, see MCL 500.1005; MSA 24.11005) to obtain statements from their accountants which are to be filed with the IC. MCL 500.1009; MSA 24.11009 also requires an insurer to obtain a "letter of awareness" from its accountant:

> (2) The insurer shall obtain a letter from the insurer's independent public accountant and shall file a copy with the commissioner stating that the independent public accountant is aware of the insurance code's provisions and the rules and regulations of the state of domicile's insurance department that relate to accounting and financial matters and affirming that he or she will express his or her opinion or the financial statements as to whether they conform to the

> accounting practices prescribed or otherwise permitted by that department, specifying the exceptions as he or she believes appropriate.

This "letter of awareness" is to be filed with the IC by the insurer.

On November 27, 1992, E & Y-Canada issued its "letter of awareness" to the Board of Directors of CLIC. That letter stated that the "letter is furnished solely for you to comply with Section 1009(2) of the Michigan Insurance Code and should be used for no other purpose."

We also note CLIC's December 31, 1992 Audit Profile, *authored by E & Y-Canada*, which states in relevant part:

> In accepting an audit engagement, *we assume a responsibility to the policyholders of Confederation Life, the Superintendent of Financial Institutions and other foreseeable parties who rely on the information presented in the financial statements* of Confederation Life Insurance Company and its subsidiaries. Our primary objective in fulfilling this responsibility is to discharge our statutory obligation under the Insurance Companies Act which requires us to issue an audit opinion to the policyholders and directors of the Company. (Emphasis added).

This lawsuit was filed in Ingham Circuit Court by the IC, in his capacity as rehabilitator,[3] on June 28, 1995. Plaintiff's

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[3] Pursuant to Michigan's insurers rehabilitation and liquidation act, (continued...)

theory is that CLIC looted the trust fund established in Michigan in order to cover losses in other parts of CLIC's business. Plaintiff named as defendants the officers and directors of CLIC, CLIC's individual accountants and the accounting partnership that audited CLIC's books and finances. According to plaintiff, E & Y-Canada knew that CLIC was diverting funds from the Michigan trust fund to cover losses elsewhere, knew that CLIC was on the brink of financial collapse, and nevertheless repeatedly represented to policyholders and to the IC that CLIC was financially sound. Plaintiff claims that CLIC replaced trust assets with worthless promissory notes of a CLIC subsidiary, something that E & Y-Canada should have known.

Defendant E & Y-Canada moved for dismissal, asserting that Michigan courts have no jurisdiction over it because E & Y-Canada has no contacts with Michigan. E & Y-Canada argued that Michigan did not obtain jurisdiction over it simply because E & Y-Canada's client (CLIC) did business in Michigan and filed opinions with the Michigan Insurance Bureau. E & Y-Canada also argued that it did not matter that E & Y-Canada could foresee that these documents would be filed in Michigan, because the conduct and contacts of E & Y-Canada determine personal jurisdiction, not the conduct or contacts of a third party.

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[3] (...continued)
MCL 500.8101 *et seq.*; MSA 24.18101 *et seq.*, the Michigan Insurance Commissioner may petition the court for an order of rehabilitation for a delinquent insurance company doing business in Michigan. If granted, the insurance company is placed in rehabilitation, and the IC is empowered to operate, liquidate or dissolve the company, for the benefit of the policyholders. *Id.*

Plaintiff argued that E & Y-Canada worked for a *Michigan* resident, because CLIC became a Michigan domiciliary by virtue of MCL 500.431a; MSA 24.1431(a). Plaintiff also argued that the annual statements issued by E & Y-Canada were directed to all policyholders, including those in Michigan, that E & Y-Canada well knew that its audit work would be relied upon in Michigan, and that E & Y-Canada agreed to comply with Michigan's insurance code and its duties thereunder in order to obtain CLIC's business.

The circuit court ruled in favor of plaintiff on April 1, 1996, finding that E & Y-Canada had "every reason to believe that that audit is going to come to the attention of the Insurance Commissioner in the State of Michigan, who is supervising their activities in this country through the state of Michigan. And they have every reason to believe that they ought to be accurate. If it's not, they ought to be able to respond."

We granted defendant's interlocutory application to appeal and we now affirm and remand for further proceedings.

III

Analysis

E & Y-Canada contends here that Michigan courts do not have the power to adjudicate the IC's claims against it because to do so would violate the Due Process Clause of the United States Constitution as interpreted by the United States Supreme Court in *World-Wide Volkswagen Corp v Woodson*, 444 US 286; 100 S Ct 559; 62 L Ed 2d 490 (1980); *Burger King Corp v Rudzewicz*, 471 US 462; 105 S Ct 2174; 85 L Ed 2d 528 (1985) and *Asahi Metal Ind Co v Superior Court*, 480 US 102; 107 S Ct 1026; 94 L Ed 2d 92 (1987). In support of its

assertion, E & Y-Canada correctly points out that is has no physical presence in Michigan and thus it argues that the "minimum contacts" requirement of the Due Process Clause is not met. We disagree.

In support of its view that Michigan courts may exercise limited *in personam* jurisdiction over E & Y-Canada arising out of E & Y-Canada's audit of CLIC, the IC correctly points out that E & Y-Canada did business systematically (annual audits for three years) for a Michigan resident,[4] knowing that its audit of CLIC would be relied upon by the IC and residents of Michigan, and knowing that CLIC could not do business in Michigan without E & Y-Canada's audit pursuant Michigan law.

To determine whether jurisdiction exists to litigate this dispute in Michigan, we look to: (1) the Michigan Supreme Court's recent reiteration of the principles governing (a) appellate review of, and (b) the basis for, limited personal jurisdiction over non-resident corporations, and (2) the United States Supreme Court's test to determine whether the exercise of jurisdiction complies with the Due Process Clause of the United States Constitution.

A

Appellate Review

In *Starbrite Dist, Inc. v Excelda Mfg* Co, 454 Mich 302; 562 NW2d 640 (1997), the Michigan Supreme Court reiterated the analytical framework for properly exercising limited

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[4] CLIC became a Michigan domiciliary by virtue of MCL 431a; MSA 24.1431(a), because it used Michigan as its state of entry.

personal jurisdiction. *Starbrite* also cited with approval its earlier decision in *Jeffrey v Rapid American Corp*, 448 Mich 178; 529 NW2d 644 (1995) which set forth the appropriate standard of review and procedural rules for the proper disposition of jurisdictional questions:[5]

> The appellate standard of review when examining jurisdictional rulings is de novo. *Williams v Bowman Livestock Equipment Co*, 927 F2d 1128, 1130 (CA 10, 1991). The plaintiff bears the burden of establishing jurisdiction over the defendant, *Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992), but need only make a prima facie showing of jurisdiction to defeat a motion for summary disposition. *Bowman Livestock* at 1131. The affidavits, together with any other documentary evidence submitted by the parties, must be considered by the court. MCR 2.116(G)(5). All factual disputes for the purpose of deciding the motion are resolved in the plaintiff's (nonmovant's) favor. See *Wiles v B E Wallace Products Corp*, 25 Mich App 300, 303-305; 181 NW2d 323 (1970); *Bowman Livestock* at 1130. [*Jeffrey*, 448 Mich at 184.]

Accordingly, here we ask whether the circuit court properly determined that it could exercise limited personal jurisdiction over E & Y-Canada based on claims asserted by the IC. To answer this question, we first review Michigan's long-arm statute for limited personal jurisdiction over corporations, MCL 600.715; MSA 27A.725, then our Supreme Court's decision in *Starbrite*, 454 Mich 302, and the United States

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[5] *Starbrite*, 454 Mich at 309 n 5, and at 311 n 7.

Supreme Court's decisions in *World-Wide*, 444 US 286; *Burger King*, 471 US 462; and *Asahi*, 480 US 102.

B

Long-Arm Statute: Limited Personal Jurisdiction over Non-Resident Corporations

We took first to the portion of Michigan's long-arm statute which addresses limited personal jurisdiction over a non-resident corporation. *Starbrite*, 454 Mich at 305-306. MCL 600.715; MSA 27A.725, provides:

> The existence of any of the following relationships between a corporation or its agent and the state shall constitute a sufficient basis of jurisdiction to enable to courts of record of this state to exercise limited personal jurisdiction over such corporation and to enable such courts to render personal judgments against such corporations arising out of the acts or acts which create any of the following relationships:
>
> (1) The transaction of any business within the state.
>
> (2) *The doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort.*
>
> (3) The ownership, use, or possession of any real or tangible personal property situated within the state.
>
> (4) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(5) Entering into a contract for services to be performed or for materials to be furnished in the state by the defendant. (Emphasis added).

Here, E & Y-Canada knew that (1) CLIC could not do business in Michigan (or in the United States for that matter) without using Michigan as its state of entry and without E & Y-Canada's audit; (2) the IC was the United States regulator of CLIC; (3) the IC relied on E & Y-Canada's audit as assurance of CLIC's financial integrity; (4) policyholders in Michigan relied on E & Y-Canada's 1991, 1992 and 1993 audits as assurance of CLIC's financial integrity, and (5) CLIC would submit E & Y-Canada's audits to the IC. E & Y-Canada also directed its audits to CLIC, which it knew to be, by statute, a Michigan resident, for transmittal to the IC -- CLIC's regulator -- and to the Michigan policyholders of CLIC. Accordingly, E & Y-Canada caused acts to be done and consequences to occur in Michigan in every meaningful sense contemplated by MCL 600.715(2); MSA 27A.725(2). Thus, this case falls within the Michigan long-arm statute.

C

Due Process

We now determine if the exercise of limited personal jurisdiction here satisfies the Due Process Clause as interpreted by the United States Supreme Court in *International Shoe Co v Washington*, 326 US 310; 66 S Ct 154; 90 L Ed 95 (1945); *World-Wide*, 444 US 286; *Burger King*, 471 US 462; and *Asahi*, 480 US 102.

(a) minimum contacts

The pivotal question here is not whether E & Y-Canada had physical contact with the forum state (Michigan); it is instead whether E & Y-Canada purposefully established "minimum contacts" - a sufficient nexus with Michigan - so that requiring E & Y-Canada to defend itself in a suit in Michigan does not offend traditional notions of "fair play and substantial justice." *International Shoe*, 326 US at 320. As our Michigan Supreme Court stated in *Jeffrey*:

> Jurisdiction may not be avoided simply because the corporate defendant has never physically been present in the forum state.
>
> [I]t is inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted. So long as a commercial actor's efforts are "purposefully directed" toward residents of another State, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there. [*Jeffrey*, 448 Mich at 188, quoting *Burger King*, 471 US at 476.]

In determining whether sufficient minimum contacts exist between a defendant and Michigan to support Michigan's exercise of limited personal jurisdiction, the Court must apply a three-pronged test:

> First, the defendant must have purposefully availed itself of the privilege of conducting

> activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise from the defendant's activities in the state. Third, the defendant's activities must be so substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. [*Starbrite*, 454 Mich at 309, quoting *Mozdy v Lopez*, 197 Mich App 356, 359; 494 NW2d 866 (1992).]

In *Starbrite*, the Court discussed "purposeful availment" as follows:

> 'Purposeful availment' is something akin either to a deliberate undertaking to do or cause an act or thing to be done in Michigan or conduct which can be properly regarded as a prime generating cause of the effects resulting in Michigan, something more than a passive availment of Michigan opportunities. The defendant will have reason to foresee being 'haled before' a Michigan court. [*Jeffrey*, 448 Mich at 187]
>
> However, the " 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts . . . ." *Burger King* [471 US at] 475 (citations omitted). The Supreme Court in *Burger King* explained that
>
> > where the defendant "deliberately" has engaged in significant activities within a State, *or has created "continuing obligations" between*

> *himself and residents of the forum,* he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. [*Id.* at 475-476 (citations omitted).] *Starbrite*, 454 Mich at 309-310.

Here, E & Y-Canada's contacts with Michigan were not "random," "fortuitous," or "attenuated." Rather, as a self-styled expert in insurance audits, with a global reach, E & Y-Canada quite purposefully directed its audits at Michigan (including Michigan's insurance regulator, the Insurance Commissioner) and purchasers of insurance products (Michigan citizens). E & Y-Canada dealt, year after year, with a statutory corporate citizen (CLIC) knowing that such a contractual relationship with CLIC was necessary for CLIC to do business in Michigan and, in turn, made possible handsome fees for E &Y-Canada. Moreover, under the IC's theory of the case, it was the E & Y-Canada audits themselves that precipitated the fraud on Michigan citizens.[6]

For E & Y-Canada to argue that because its audits were physically transmitted into Michigan by *CLIC*, E & Y-Canada had no "contact" with Michigan would be similar to an arms

---

[6] The dissent would conclude that E & Y-Canada's own actions directed toward Michigan were insufficient to constitute minimum contacts. This conclusion cannot be supported where E & Y-Canada, a sophisticated company, was fully aware of the relevant requirements of Michigan insurance law, authored and sent a "letter of awareness" to comply with these requirements and expressly assumed (in its audit) an obligation to the CLIC policyholders, including those located in Michigan.

manufacturer disclaiming any contact with Michigan while knowingly providing SCUD missiles to someone launching them into Michigan. Here, E & Y-Canada not only knew what was being directed at Michigan and its residents but knew full well the target and the damage estimates. E & Y-Canada purposefully availed itself of this business opportunity in Michigan in 1991, 1992 and 1993.

Further, to paraphrase *Starbrite*, although E & Y-Canada did not solicit business in Michigan, it certainly chose to do business in Michigan. 454 Mich at 310-311. Also, just as *Starbrite* distinguished its holding from that of *Asahi*, (*Starbrite*, 454 Mich at 312), we too note that E & Y-Canada did *not* merely place its audits "into the stream of commerce, not having further knowledge regarding where that product might end up." 454 Mich at 312. Rather E & Y-Canada purposefully directed its audit at the IC and Michigan policyholders "which is qualitatively different than the mere act of placing its product into the stream of commerce." *Id.*

As to the second prong of the minimum contacts test (cause of action arose from defendant's activities in the state), the Insurance Commissioner's claim arises out of the very conduct which the IC claims caused the financial harm to Michigan citizens and which is inextricably intertwined with the E & Y-Canada audits. The cause of action arises from E & Y-Canada's activities in Michigan. We therefore conclude that E & Y-Canada's knowing and intentional contacts with Michigan were so substantial as to render the exercise of jurisdiction over E & Y-Canada fair and just.

(b) other factors

Once these two prongs have been met, the third prong of the minimum contacts test requires us to determine whether exercise of jurisdiction over the defendant is "reasonable" - that is, whether Michigan's exercise of jurisdiction comports with traditional notions of fair play and substantial justice. *Starbrite*, 454 Mich at 313. "Where a defendant who purposefully has directed [its] activities at forum residents seeks to defeat jurisdiction, [it] must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 US at 477, quoted with approval in *Starbrite*, 454 Mich at 313.

The Supreme Court has held that a court must consider the following factors in determining the reasonableness of jurisdiction: "the burden on the defendant, the forum State's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the controversies, and the shared interest of the several states in furthering fundamental substantive social policies."[7] *World Wide*, 444 US at 292; *Starbrite* 454 Mich at 313.

We therefore proceed to consider the "other factors" of *World-Wide* and *Starbrite*.

---

[7] Indeed, these considerations may reasonably establish personal jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. *Burger King*, 471 US at 477.

i. defendant's burden

The burden placed on the defendant by litigating in a foreign forum should always be a "primary concern" in due process analysis. *World Wide*, 444 US at 292. However, if defendant's actions suggest that he could reasonably foresee being haled into court in a foreign forum, the burden of litigating in that foreign forum is minimal. *Burger King*, 471 US at 473-474. A corporation purposefully availing itself of activities within a certain state has "clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs onto customers, or, if the risks are too great, severity its connection with the State." *World Wide*, 444 US at 297.

As discussed previously, E & Y-Canada purposefully availed itself of the benefits and privileges of doing business in Michigan. E & Y-Canada knew that CLIC was domiciled in Michigan for the purpose of selling insurance; accordingly, in auditing CLIC, E &Y-Canada knew that it was providing services to a Michigan resident. E & Y-Canada provided CLIC with an "awareness letter" knowing that its audit reports would be forwarded to the Michigan Insurance Bureau. Furthermore, E & Y-Canada addressed its audit reports "To the Policyholders," many of whom are Michigan residents. These actions suggest that E & Y-Canada could reasonably foresee being haled into court in Michigan, and that the burden of doing so does not render jurisdiction unreasonable.

The Supreme Court has indicated that alien defendants should be treated with a more exacting scrutiny that United States defendants. *Asahi*, 480 US at 114. The *Asahi* Court found that a defendant's burden in traversing the Pacific Ocean (from Japan to California) and learning a foreign nation's legal

system weighed heavily in favor of denying jurisdiction. Here, unlike *Asahi*, exercising jurisdiction over E & Y-Canada does not offend traditional notions of fair play and substantial justice. The distance which E & Y-Canada must travel between Ontario and Michigan is not nearly the distance that Asahi would have been required to travel. The burdens placed upon E & Y-Canada to defend itself in the United States legal system are also comparatively slight. E & Y-Canada is an integral part of an international organization of accounting firms that aggressively markets and promotes the services of its members throughout the world. It is not unduly burdensome to subject a member of such a worldwide organization to jurisdiction in Michigan where it has done business and created consequences to Michigan residents on a continuing basis.

In assessing the burden to defendant, we also consider the accounting profession in which defendant is engaged - the United States Supreme Court has highlighted the obligations of a certified professional accountant:

> An independent certified public accountant performs a different role. By certifying the public reports that collectively depict a corporation's financial status, *the independent auditor assumes a public responsibility transcending any employment relationship with the client.* The independent public accountant performing this special function owes ultimate allegiance to the corporation's creditors and stockholders, as well as to the investing public. *This "public watchdog" function demands that the accountant maintain total independence from the client and requires complete fidelity to the public trust. United States v Arthur Young & Co*, 465 US

805, 817-818; 104 S Ct 1495; 79 L 2d 826 (1984). (Emphasis added).

We therefore conclude that the burden on defendant E & Y-Canada is not excessive.

ii. the interests of plaintiff and the State

Normally, when minimum contacts are established, the interests of the plaintiff and the forum state will justify even the serious burdens placed on the alien defendant. *Asahi*, 480 US at 114. No state or province has a stronger interest than Michigan in the resolution of the present controversy. This state has strong policy interest in holding professionals who agree to serve as accountants for Michigan entities to their common law and statutory responsibilities. Similarly, when such accountants disregard those responsibilities, the IC has a substantial interest in holding them accountable in this state to injured policyholders. The underlying purpose behind Michigan's comprehensive insurance regulations would be eviscerated if an accounting firm could voluntarily provide misleading financial information about an insurer to the IC and escape liability in this state.

Furthermore, as discussed in footnote 3, the IC is charged with overseeing and regulating all insurance companies which do business in Michigan, for the benefit of policyholders. MCL 500.222; MSA 24.1222. See also MCL 500.200 *et seq.*; MSA 24.1200 *et seq.*, and MCL 500.402 *et seq.*; MSA 24.1402. In the context of an alien insurance company, the IC in reality acts on behalf of all United States policyholders. Similarly, after an insurance company has entered rehabilitation, the IC has extensive obligations to rehabilitate or dissolve the company, and to reduce the risk of loss to policyholders. See MCL

500.8101; MSA 24.18101. Thus, the interest of the plaintiff IC, in his capacity as regulator for all policyholders in the United States, is substantial.

iii. the shared interests of the several States

The *World Wide* Court also held that we should consider the "shared interests of the several States," in addition to the forum state, in the efficient judicial resolution of the dispute and the advancement of substantive social policies. *World Wide*, 444 US at 292. This calls for us to consider the procedural and substantive policies of other states whose interests are affected by our assertion of jurisdiction over E & Y-Canada. Michigan's sister states not only share its interest in regulating the business of insurance, but look to it to deal with the problems that result from the insolvency of an insurer domiciled in Michigan. Congress has determined, by enactment of the McCarran-Ferguson Act, 15 USC 1011, that regulation of insurance rests with the states. Thus, holding E & Y-Canada accountable in Michigan for the harm it has caused CLIC's U.S. policyholders is consistent with the policies embodied in our state-based scheme of insurance regulation.

This same interest has been recognized by at least one other state. In a suit brought in New Jersey by US policyholders against CLIC, a federal district court abstained from hearing a claim against CLIC because doing so would disrupt Michigan's important and complex insurance regulatory system. *Glushakow v District Court of New Jersey*, 1994 U.S. Dist LEXIS 20325, (DNJ, Dec 5, 1994). At the request of Michigan's Insurance Commissioner, *Glushakow* stayed plaintiffs' action, reasoning that Michigan is the most efficient and inexpensive forum in which to litigate claims arising out of CLIC's collapse:

> The raison d'etre of a state rehabilitation or liquidation proceeding is to impose order on chaos by bringing the assets of and liabilities of the ailing company within a single proceeding. Collateral suits in other fora must perforce be disruptive. Finally, as the extensive state regulation recognizes, the security of insurance companies is vitally important to the economic well-being of a large number of individual citizens. Consequently, the public policy ramifications of decisions regarding insurance companies will often transcend the importance of the case at bar. *Glushakow*, (unpublished opinion at p 20).

The *Glushakow* Court also recognized that if individual state law claims were allowed to proceed, Michigan's rehabilitation proceeding might be "aborted by the liquidation of the insurance companies with a consequent waste of judicial resources." *Id.* at 14. These considerations suggest that the "several States" have a manifest interest in litigating CLIC's collapse in Michigan.

IV

Other Jurisdictions

We also find guidance in cases from other jurisdictions that have addressed personal jurisdictional issues over non-resident accountants. In *United Bank of Kuwait, PLC*, v *Bridges,* 766 FSupp 113 (SDNY 1991), plaintiff, who had relied to its detriment on an audit of a third party, brought an accountant malpractice claim in New York federal district court against the Virginia accountant and his firm. Though the court

granted defendants' motion to dismiss, its reasoning supports our exercise of jurisdiction over E & Y-Canada:

> In general, before an accountant may be held liable in negligence to noncontractual parties who rely to their detriment on inaccurate financial reports, the accountant must have been aware the reports were to be used for a particular purpose, in furtherance of which a known party was intended to rely, and there must have been some conduct on the part of the accountant which evinces the accountant's understanding of that party's reliance. *Bridges*, 766 FSupp at 117.

Similarly, in *Reingold v Deloitte Haskins & Sells*, 599 FSupp 1241 (SDNY 1984), the New York federal district court exercised personal jurisdiction over the Australian office of Deloitte Haskins and Sells:

> The plaintiffs have provided evidence sufficient to establish prima facie that DH&S (Aus.) knew or should have known on November 12, 1980, when it signed and issued the 1980 Ferrovanadium audit [in Australia], that the audit would be incorporated in an annual report in a United States securities filing . . . . By issuing the 1980 audit, the Australian accountants subjected themselves to this Court's jurisdiction for causes of action arising out of that audit. *Reingold*, 599 FSupp at 1259.

We have also carefully reviewed *Young v FDIC*, 103 F3d 1180 (CA4, 1997), submitted as supplemental authority by E & Y-Canada. Analyzing these cases together, it is apparent that the mere fact that it is foreseeable that an audit will be used by

someone in a different forum is insufficient to subject the auditor to the jurisdiction of the different forum. However, where as here, there is evidence that the auditors knew the purpose of the audit, knew what the client planned to do with the audit, knew the existence of a third party (the IC), and that the third-party would be relying upon the audit, personal jurisdiction may be appropriately exercised.

V

Conclusion

For all the foregoing reasons, we uphold and affirm the trial court's judgment that its exercise of jurisdiction over E & Y-Canada satisfies Michigan's long-arm statute[8] and the Due Process Clause of the United States Constitution.

Affirmed, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Henry William Saad
/s/ Michael D. Schwartz

• • • •

[8] MCL 600.715; MSA 27A.725 (limited personal jurisdiction over a corporation).

JANSEN, P.J. (dissenting).

I respectfully dissent. I disagree with the majority's conclusion that defendant[9] had sufficient minimum contacts with Michigan to support assertion of limited personal jurisdiction. I would hold that the exercise of limited personal jurisdiction in this case constitutes a violation of the Due Process Clause. Consequently, I would reverse the decision of the trial court.

Our Supreme Court has stated that the constitutional inquiry in this regard is whether the defendant purposefully established minimum contacts in the forum state such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Witbeck v Bill Cody's Ranch Inn*, 428 Mich 659, 666; 411 NW2d 439 (1987), citing *International Shoe Co v Washington*, 326 US 310, 316; 66 S Ct 154; 90 L Ed 95 (1945). In determining whether sufficient minimum contacts exist between a defendant and Michigan to support Michigan's exercise of limited personal jurisdiction, the court is to apply a three-pronged test. First, the defendant must have purposefully availed itself of the privilege of conducting activities in Michigan, thus invoking the benefits and protections of this state's laws. Second, the cause of action must arise form the defendant's activities in the state. Third, the defendant's activities must be so substantially connected with Michigan to make the exercise of jurisdiction over the defendant reasonable. *Starbrite Dist, Inc v Excelda Mfg Co*, 454 Mich 302, 309; 562 NW2d 640 (1997), citing *Jeffrey v Rapid American Corp*, 448 Mich 178, 186; 529 NW2d 644 (1995). I would hold that the facts of this case do not support

---

[9] In this opinion, defendant will refer solely to Ernst & Young-Canada because it is the only defendant involved in this appeal.

a finding of sufficient minimum contacts to assert personal jurisdiction over defendant.

First, I do not find that defendant purposefully availed itself of the privilege of conducting activities in Michigan. Our Supreme Court has started that the defendant's own conduct with the forum must be examined in order to determine whether the defendant should reasonably anticipate being haled into court there. *Id.*, p 187. The unilateral acts of unrelated third parties may not be used to justify the imposition of personal jurisdiction. *Id.* The requirement of purposeful availment ensures that a corporation will not be subjected to jurisdiction on the basis of random, fortuitous, or attenuated contacts. *Id.*

The facts of this case indicate that defendant's contacts with Michigan are attenuated. Rather, defendant's contacts with Michigan are almost nonexistent. Defendant is a partnership of Canadian charted accountants based in Toronto, Ontario. Defendant audited the consolidated financial statement of Confederation Life Insurance Company (CLIC) in 1991, 1992 and 1993. Defendant has no physical presence in Michigan: it has no employees or property in Michigan, has never done business in Michigan, and has provided no auditing or accounting services in Michigan. Additionally, CLIC is a mutual insurance company organized in Canada, with its principal place of business in Canada, although it did business throughout the United States and United Kingdom as well. CLIC is a Canadian company regulated by Canadian insurance authorities. Michigan is merely CLIC's state of entry into the United States, but this does not make even CLIC a Michigan resident.

More importantly, the question of the foreseeability of defendant's audits being relied upon in Michigan is not

sufficient to create the proper exercise of limited personal jurisdiction. Foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. *World-Wide Volkswagen Corp v Woodson*, 444 US 286, 295; 100 S Ct 559; 62 L Ed 2d 490 (1980). Rather, it is the defendant's conduct and connection with the forum state that must be such that the defendant should reasonably anticipate being haled into court there. *Id.*, p 297. Indeed, defendant never directly sent any of its audit reports or opinions to anyone in Michigan. Thus, the audit reports did not create any special relationship or contact with Michigan. Our Supreme Court's decision in *Khalaf v Bankers & Shippers Ins Co*, 404 Mich 134; 273 NW2d 811 (1978) is particularly instructive on this point. The Court in *Khalaf*, pp 145-146, stated:

> Proof alone that a nonresident caused an effect in Michigan that was foreseeable does not establish a relationship to Michigan such as to make it fair and reasonable to subject the nonresident to jurisdiction. A nonresident insurance agent is not subject to long-arm jurisdiction in an action for negligent procurement of insurance solely on evident that i) he knows the insured may engage in activities outside the state in which the insured's activities are generally centered and the agreement to procure insurance was made and ii) he agreed to procure insurance which covered those activities.

Because defendant had no conduct or connection with Michigan, it could not reasonably anticipate being haled into

court in this state.[10] Therefore, I would find that defendant did not purposefully avail itself of the benefits of Michigan law and had insufficient contacts with Michigan to sustain Michigan's assertion of personal jurisdiction over defendant.

With respect to the second and third prongs, neither of those has been met either. The cause of action did not arise from defendant's activities within this state because defendant conducted no activities within Michigan. Further, defendant having no activities with Michigan, its activities are not so substantially connected with Michigan to make the exercise of jurisdiction reasonable.

Finally, at this juncture, I would note that plaintiff could bring suit against defendant in a Canadian forum. In fact, plaintiff is litigating issues against defendant in a proceeding in Ontario. Therefore, the fact that personal jurisdiction does not arise in Michigan does not mean that Michigan policyholders of CLIC are without legal recourse.

---

[10] For other factually similar cases involving insufficient minimum contacts over foreign accountants, see, e.g., *General Electric Capital Corp*, 991 F2d 1376, 1387-1388 (CA 8, 1993) (Canadian auditors did not have sufficient minimum contacts with Minnesota by sending a copy of a certification of net equity of the Canadian subsidiary of the Minnesota corporation to the parents' directors in Minnesota or by sending the Canadian subsidiary's financial statements to auditors in Minnesota); *Young v FDIC*, 103 F3d 1180, 1190-1192 (CA 4, 1997) (Bahamas accounting firm did not have sufficient minimum contacts with South Carolina where it used information contained in a standard bank confirmation form submitted to a South Carolina bank to substantiate its audit of an insurance company's financial statement).

I would reverse the trial court's order denying defendant's motion for summary disposition due to lack of personal jurisdiction.

/s/ Kathleen Jansen

APPENDIX D

ORDER

Michigan Supreme Court
Lansing, Michigan

Entered: December 23, 1997

Conrad L. Mallett, Jr.
Chief Justice

110756 & (105)(115)

James H. Brickley
Michael F. Cavanagh
Patricia J. Boyle
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Justices

COMMISSIONER OF INSURANCE
OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 110756
COA: 194261
LC : 95-80798-CZ

GEORGE R. ALBINO, WILLIAM H. ALEXANDER, JOHN D. ALLAN, WILLIAM BENTON, CONRAD M. BLACK, BENNETT A. BROWN, PATRICK D. BURNS, PAUL G. S. CANTOR, WILLIAM D. DOUGLAS, MARK E. EDWARDS, KENNETH E. FIELD, NAN-B DE GASPE BEAUBIEN, IRVING R. GERSTEIN, ANTHONY F. GRIFFITHS, SIR ANTHONY S. JOLLIFFE, THOMAS E. LADNER, GEORGE E. MARA, ROBERT W. MARTIN,

DAVID MCCAMUS, DARYL E.
MCLEAN, ANDRE MONAST,
MICHAEL REGESTER, JOHN RHIND,
MICHAEL ROSENFELDER, BORDEN
D. ROSIAK, MICHAEL J. WHITE,
ADAM H. ZIMMERMAN, HARRIS
TRUST AND SAVINGS BANK,
ERNST & YOUNG LLP,
Defendants,

ERNST & YOUNG-CANADA,
Defendant/Appellant.

On order of the Court, the motion for immediate consideration, the application for leave to appeal and the motion to maintain confidentiality are considered. The motion for immediate consideration is GRANTED. The application for leave to appeal is DENIED because we are not persuaded that the questions presented should be reviewed by this Court. The motion to maintain confidentiality is DENIED as moot. We VACATE the stay previously ordered by this Court.

Supreme Court, U.S.
FILED
APR 27 1998
CLERK

No. 97-1589

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ERNST & YOUNG,
a Canadian Partnership of Chartered Accountants,
Petitioner,
v.
THE COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Michigan

BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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30 pp

QUESTION PRESENTED

Where a professional partnership of Canadian chartered accountants, not certified to practice accounting in the United States and having no direct contacts with Michigan, reports on the financial statements of a Canadian insurance company in Canada pursuant to Canadian accounting and auditing standards, does the Canadian accounting firm's knowledge that its multinational corporate client does business in the United States and may send the accounting firm's audit opinion into Michigan for review by regulators and/or policyholders satisfy the constitutional minimum contacts standard for personal jurisdiction over the accounting firm by a Michigan court?

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IN THE

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On Petition for a Writ of Certiorari to the Court of Appeals of the State of Michigan

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BRIEF OF THE AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The American Institute of Certified Public Accountants (the "Institute") submits this brief as *amicus curiae*, pursuant to Rule 37.2 of the Rules of this Court, in support of Petitioner Ernst & Young, a Canadian partnership of chartered accountants (hereinafter "E&Y-Canada" or "Petitioner") with the written consent of the parties.[1]

---

[1] The letters of consent have been filed with the Clerk of the Court. No counsel for any party to this action authored this brief in whole or in part. No person or entity other than the Institute, its members, and its counsel made a monetary contribution to the preparation or submission of this brief.

INTEREST OF THE INSTITUTE AS *AMICUS CURIAE*

The Institute is the national organization of the certified public accounting profession, with more than 330,000 members. Institute members in public practice, who range from sole practitioners to members of large international firms, provide a wide range of accounting services to the public. One of the primary objectives of the Institute is the development of authoritative accounting, auditing, and ethical standards of practice. These standards include, for purposes here, those governing the preparation and scope of auditing, tax, and other opinions and reports rendered by accountants.

The issue presented by the Petition transcends the interests of the parties and is of particular importance to the Institute and its members. The Institute submits this brief in support of the Petitioner because the decision below threatens important and legitimate interests of its members and the international business community generally. Consistent with applicable Institute and other standards, accountants around the world routinely issue reports and provide written advice to clients concerning various aspects of corporate transactions. These engagements range from traditional auditing functions to consulting on proposed or hypothetical transactions. Increasingly, accounting firms, as well as other professionals such as lawyers, appraisers, and investment bankers, provide services in connection with multinational transactions and to clients having a presence in more than one jurisdiction or country. This globalization of business, and the apparent breakdown of traditional territorial boundaries, require American courts to be particularly sensitive to the due process interests implicated in the exercise of personal jurisdiction so as to prevent the imposition of excessive burdens of litigation in American courts on entities having little or no contact with this country.

The decision by the Michigan Court of Appeals, which essentially imputes the Michigan contacts of a client to its

nonresident accountant for jurisdictional purposes, threatens the ability of accounting firms and other professionals to provide necessary services to their clients because it exposes such professional advisors to liability in whatever jurisdiction their clients choose to do business. The specific concerns raised by the decision below, which conflicts with existing jurisprudence of this Court and represents one side of a split among the federal circuit courts of appeals, are the following:

First, a rule of law that a professional advisor is subject to the personal jurisdiction of, and the burden of litigating in, any American court where it may be aware that its client may have a presence or use the services provided by the advisor, inappropriately creates a lower and more burdensome standard for nonresident professionals providing information services than for foreign manufacturers of products.

Second, such a rule of law will harm United States and international commerce because it may substantially increase the costs and uncertainties of providing professional information services which, in turn, may make it more difficult for multinational corporations doing business in the United States to find cost-effective professional services for their international operations.

Third, such a rule may encourage other nations to exercise comparable and exorbitant jurisdiction over American accountants and other professionals who have no greater ties or relations with those foreign jurisdictions than E&Y-Canada has with Michigan.

Finally, the rule of law could well lead to a conflict between the governments and laws of Canada (and other countries) and the United States, to the detriment of trade between those nations.

In order to avoid unnecessary duplication, the Institute defers to the Petitioner's recitation of the Statement of the Case.

THE DECISION BELOW

The Michigan Court of Appeals, by a 2-to-1 majority, held that, notwithstanding E&Y-Canada's absence of direct contacts with Michigan, E&Y-Canada had purposefully established minimum contacts with Michigan sufficient to justify the exercise of personal jurisdiction in Michigan under Michigan's long-arm statute. M.C.L. § 600.725(2); M.S.A. § 27A.725(2) (long-arm jurisdiction predicated upon "[t]he doing or causing any act to be done, or consequences to occur, in the state resulting in an action for tort"). The court concluded that such a finding was appropriate because: (1) E&Y-Canada had rendered professional accounting services to a multinational company which, although a Canadian insurer, was also deemed under a Michigan legal fiction to be a Michigan domiciliary; and (2) E&Y-Canada could have foreseen that the annual reports of Confederation Life Insurance Company ("CLIC"), including E&Y-Canada's audit opinions, would be sent by CLIC into Michigan as part of CLIC's regulatory filings and would be relied upon by Michigan regulators and policyholders. *Commissioner of Ins. v. Albino*, 572 N.W.2d 21, 28 (Mich. Ct. App. 1997) (Pet. App. at C-16).

The dissenting judge (Jansen, J.) rejected the majority's reasoning, finding that E&Y-Canada did not have "minimum" contacts with Michigan sufficient to assert personal jurisdiction. Judge Jansen specifically stated that "[t]he unilateral acts of unrelated third parties may not be used to justify the imposition of personal jurisdiction" and that "the question regarding the foreseeability of defendant's audits being relied upon in Michigan is not sufficient to create the proper exercise of limited personal jurisdiction." *Id.* at 32 (Pet. App. at C-26). Judge Jansen also highlighted the tenuous links of CLIC itself with the Michigan forum: "Michigan is merely CLIC's state of entry into the United States, but this does not make even CLIC a Michigan resident." *Id.*

REASONS FOR GRANTING THE WRIT

I. THE ISSUE PRESENTED IS OF GREAT IMPORTANCE TO ACCOUNTING FIRMS AND OTHER PROFESSIONALS PROVIDING INFORMATION SERVICES TO MULTINATIONAL CORPORATIONS.

Accountants render valuable professional services in a wide range of commercial transactions. In addition to traditional auditing, tax, and accounting services, accountants advise and report on numerous financial matters. Through these professional engagements, accountants play a valuable role in evaluating and reporting complex financial data on behalf of their clients and the marketplace. These services are vital to the growth and competitive viability of our economy. *See Sharp v. Coopers & Lybrand*, 649 F.2d 175, 184 (CA3 1981) (recognizing important services performed by accountants), *cert. denied*, 455 U.S. 938 (1982). However, accountants are often drawn into litigation as additional "deep pocket" defendants in fora of whose benefits they have not purposefully availed themselves. *See, e.g., Young v. FDIC*, 103 F.3d 1180 (CA4), *cert. denied*, 118 S. Ct. 329 (1997); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326 (CA2 1972); *United Bank of Kuwait, PLC v. James M. Bridges, Ltd.*, 766 F. Supp. 113 (S.D.N.Y. 1991); *Morley v. Cohen*, 610 F. Supp. 798 (D. Md. 1985); *In re Chambers Dev. Co. Shareholders Litig.*, [1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,637 (Del. Ch. May 20, 1993); *Hotel Partners v. KPMG Peat Marwick*, 847 S.W.2d 630 (Tex. App. 1993, *writ denied*).

As the economy shifts from sales of goods to transactions in information services and the economy becomes increasingly global in nature, American courts must be extra vigilant not to expose foreign professionals to jurisdiction in such courts where assumption of jurisdiction would violate the Due Process Clause. The decision of the Michigan Court of Appeals will subject accountants,

and other professionals providing information services, to suit anywhere their clients choose to do business, irrespective of appropriate measures that the professionals have taken to limit their jurisdictional exposure.

Unlike manufacturers of goods, professionals—such as accountants, lawyers, and appraisers—sell services. Such professionals are governed by laws, regulations, and rules that limit the geographic scope of their practice. Here, E&Y-Canada was restricted by Canadian professional rules to practice accounting only in Canada. E&Y-Canada is not certified by Michigan to practice public accounting in Michigan. Indeed, Canada has its own set of licensing and auditing standards that differ from the standards applicable to certified public accountants in the United States. Clients of such professionals are neither bound nor limited by such rules and may choose to do business in the United States, regardless of the efforts of their professional advisors to structure their own businesses to remain exclusively within one locale or jurisdiction.

Under the reasoning of the Michigan Court of Appeals, a unilateral decision by a client to do business in the United States threatens automatically to expose its accountants, and other professionals providing information services to such a client, to jurisdiction (and, possibly, legal liability) in federal and state courts here. If the reasoning of the court below and the courts that have adopted similar reasoning (*see* Pet. at 16-22) stands uncorrected, it may have important and far-reaching consequences for accountants and other professionals that provide financial and other services to clients having a multinational presence. Indeed, the reasoning of the court below may trigger the application of similar over-expansive jurisdictional standards by foreign courts to American professionals providing services to corporations having a presence in those foreign jurisdictions.

II. THE COURT SHOULD REVIEW THE DECISION BELOW AND ESTABLISH A MEANINGFUL AND UNIFORM STANDARD FOR THE EXERCISE OF PERSONAL JURISDICTION OVER PROFESSIONALS PROVIDING INFORMATION SERVICES.

A. The "Foreseeability" Standard Established by the Court Below for Asserting Personal Jurisdiction Over a Foreign Professional Providing Information Services Is Lower Than the Standard Established by This Court for Asserting Personal Jurisdiction Over a Foreign Manufacturer of Goods.

Although this Court has never addressed the limits of the Due Process Clause in the precise circumstances presented by this case, two guiding and related principles have emerged from this Court's jurisprudence. Both are particularly pertinent here, and both were ignored by the Michigan Court of Appeals.

First, this Court has held, in the context of a foreign manufacturer of products, that foreseeability that a product may cause injury within a state is not a "sufficient benchmark for personal jurisdiction under the Due Process Clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980) (White, J.). Instead, the "foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.* at 297.

Second, this Court has held that any jurisdictionally relevant contacts must be those of the defendant over whom jurisdiction is to be asserted rather than contacts of any third party. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985) ("[A] defendant will not be haled into a jurisdiction solely as a result of . . . the 'unilateral activity of another party or a third person.' Jurisdiction is proper, however, where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State.") (emphasis in

original) (citations omitted); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) ("[The] unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State.").

Here, CLIC unilaterally used E&Y-Canada's audit opinion and transmitted it to the Michigan Commissioner of Insurance. E&Y-Canada had no control whatsoever over CLIC's decision to transmit the results of Canadian accounting services provided under Canadian accounting rules in Canada into the Michigan forum. The fact that E&Y-Canada could have foreseen that its client might engage in such conduct is simply insufficient to confer personal jurisdiction over E&Y-Canada under the standards developed by this Court in the context of foreign product manufacturers who place products into the "stream of commerce." In that context, this Court has cautioned that "the mere likelihood that a product will find its way into the forum State" is not sufficient to exercise jurisdiction over the manufacturer of the products under due process principles. *World-Wide Volkswagen*, 444 U.S. at 297. *See also Asahi Metal Indus. Co. v. Superior Court of Cal.*, 480 U.S. 102, 112 (1987) ("[A] defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.") (plurality opinion); *Gould v. P.T. Krakatau Steel*, 957 F.2d 573, 576 (CA8) ("Standing alone, the fact that Krakatau could foresee that its product might find its way to Arkansas is too attenuated to constitute purposeful availment of Arkansas' laws and protections."), *cert. denied*, 506 U.S. 908 (1992).

By creating a mere "foreseeability" standard, the decision below establishes a *lower* standard for the assertion of personal jurisdiction over foreign professionals providing information services than for foreign manufacturers

of products. This different and lower standard is burdensome, unfair, and singularly inappropriate. There is a crucial difference between a manufacturer of goods and a provider of services—a distinction that is reflected in judicial decisions that have refused to expand liability of accountants to all persons who may foreseeably rely on accountants' opinions. That distinction, however, warrants a *higher*, not lower, standard for personal jurisdiction under the Due Process Clause.

The crucial distinction is this: A foreign manufacturer exercises far greater control over the distribution of its product than can a professional rendering information services. A manufacturer can control the number of products that it manufactures and the entities to which it will ship those goods. The manufacturer is thus able to limit its potential liability to third persons and can factor the risks and burdens of potential American litigation into the price of its product.

By contrast, professionals providing information services outside the United States do not have the same ability to limit their exposure. Once a professional renders intangible information services to its client, the professional loses all meaningful control over the client's distribution and use of that information. Courts have recognized this important distinction between "information" and "products" in establishing the proper standard of negligence liability for reports prepared by accountants. *See, e.g., Bily v. Arthur Young & Co.*, 834 P.2d 745, 762-63 (Cal. 1992) (rejecting argument that accountants should be liable to all persons who foreseeably rely on accountants' professional opinions). Similarly, in *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931), then-Chief Judge Cardozo for this very reason refused to apply to public accountants the same rules of liability that he had applied to manufacturers of dangerous products in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916). *See*

Ultramares, 174 N.E. at 445 (refusing to attach a "like liability . . . to the circulation of a thought or a release of the explosive power resident in words").

Thus, unlike a foreign manufacturer sending goods into the United States, a professional providing information services outside the United States to a multinational client lacks any effective means of controlling that client's subsequent distribution of the information in this country. The professional in such circumstances cannot be said to "purposefully avail" itself of the American forum where its client uses the information.

The Court should grant the petition for certiorari to review the decision of the court below and establish a standard for personal jurisdiction reflecting the fact that professional providers of information services lack control over the distribution of their "products" and should not be found to have "purposefully availed" themselves of a forum simply because their clients may foreseeably do business there. Such a standard should be higher than, or at the very least the same as, the standard that this Court has applied to manufacturers of products.

B. The Decision Below Will Increase the Cost and Uncertainty of Providing Necessary Information Services to Multinational Corporations Having a Presence in the United States.

A rule that a professional providing information services is subject to personal jurisdiction wherever its client may foreseeably do business or use its services will substantially increase the cost and uncertainty of providing such services. The decision below will inflict real economic burdens on accountants and other professionals outside the United States. Such professionals will not be able to plan with any certainty where they might be subject to suit because the situs of any potential legal action will be left to the discretion of a client who may or may not do

business in any of the fifty states. Consequently, corporations doing business in the United States may find it difficult to obtain cost-effective professional services for their international operations. These undesirable effects are clearly harmful to both United States and international commerce.

C. The Rule of Law Established by the Court Below May Lead to Conflicts With Foreign Courts and Undesirable Results for American Professionals Providing Services to Foreign Corporations.

If the reasoning of the Michigan Court of Appeals is adopted by other states it will create an additional and serious risk that foreign jurisdictions may reciprocally apply similar aggressive jurisdictional standards to accountants and other professionals providing services *in the United States* to foreign corporations doing business here. If a foreign court applied such a "foreseeability" jurisdictional standard, it is unclear whether an American court would enforce a judgment procured under such circumstances. *See, e.g.*, Uniform Foreign Money-Judgments Recognition Act § 4(a)(2) (1986 & Supp. 1997) (including lack of personal jurisdiction over defendant among grounds for non-recognition of foreign judgment). Subjecting accountants and other professionals practicing in the United States to litigation in far-flung jurisdictions simply because their clients choose to do business in those places is a dangerous byproduct of the decision below.

Although the court below addressed the "reasonableness" of exercising long-arm jurisdiction over E&Y-Canada under due process principles, it summarily ignored the potential harmful effect that its "foreseeability" rule might have on relations between it and the Canadian courts. Respondent himself is pursuing claims in Ontario against CTSL, a CLIC subsidiary, and CLIC's total company liquidation is proceeding in Ontario. Yet, the court below never even considered that Ontario might have an interest

in the standards that should apply to an Ontario-based accountant that provided accounting services in Canada under Canadian accounting rules to its Canadian client. Indeed, the court below was wholly impervious to the dangers of extraterritorially applying Michigan law to Canadian accountants for Canadian conduct governed by Canadian law. *See Asahi*, 480 U.S. at 115 (" 'Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field.' ") (quoting *United States v. First Nat'l City Bank*, 379 U.S. 378, 404 (1965) (Harlan, J., dissenting)).

In extreme circumstances, rulings by American courts that have encroached upon the judicial authority of other nations have resulted in regrettable retaliatory measures by those nations. *See, e.g.*, Gary B. Born, *International Civil Litigation in United States Courts* 850-52 (3d ed. 1996) (observing that "some 15 foreign states have taken more vigorous steps to thwart U.S. discovery" and "most foreign nondisclosure statutes are comparatively recent enactments that were precipitated by unilateral U.S. extraterritorial discovery"). A rule of law that professionals outside the United States are subject to the jurisdiction of American courts in any state where their clients may foreseeably do business is the type of sweeping extraterritorial pronouncement that may have serious repercussions in foreign courts and legislatures.

D. This Case Presents an Appropriate Context for This Court to Address the Important Question Raised by the Petition.

The 2-to-1 decision of the court below presents a perfect opportunity to resolve the important and clear question of whether a professional's knowledge that its client may transmit information provided by the professional into an American forum is sufficient to exercise *in personam* jurisdiction over the professional. The majority concluded that foreseeability was enough, whereas the

dissent believed that "the question regarding the foreseeability of defendant's audits being relied upon in Michigan is not sufficient to create the proper exercise of limited personal jurisdiction." *Commissioner of Ins.*, 572 N.W.2d at 32 (Pet. App. at C-26 to C-27). Indeed, this narrow issue has caused a split of authority in the federal circuit courts of appeals. The Institute will not repeat the Petitioner's detailed treatment of this subject (Pet. at 16-22), with which it concurs. Suffice it to say that the question presented by the Petition has caused substantial confusion in both state courts and lower federal courts leading to jurisdictional outcomes governed by the fortuity of the fora in which cases are brought. The question is of such importance to accountants, appraisers, architects, lawyers, and other professionals providing information or advice to multinational clients, and the dissonance in the lower courts is so severe that review by this Court is warranted.

CONCLUSION

For the foregoing reasons, the American Institute of Certified Public Accountants respectfully requests that the Court grant a writ of certiorari to review the decision of the Court of Appeals of the State of Michigan.

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Dated: April 27, 1998

Supreme Court, U.S.
FILED
APR 24 1998
OFFICE OF THE CLERK

No. 97-1589

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

ERNST & YOUNG,
a Canadian Partnership of Chartered Accountants,
Petitioner,
v.
THE COMMISSIONER OF INSURANCE
OF THE STATE OF MICHIGAN,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Michigan

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QUESTION PRESENTED

Can Michigan exercise jurisdiction over the auditor of a Canadian insurer that is domiciled in and regulated by Michigan, where the auditor consents to the filing of its audit opinions with the Michigan insurance regulator and the claims asserted arise out of those opinions?

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THE COMMISSIONER OF INSURANCE
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On Petition for a Writ of Certiorari to the Court of Appeals of the State of Michigan

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BRIEF IN OPPOSITION

OPPOSITION TO THE PETITION

Respondent, the Commissioner of Insurance of the State of Michigan, respectfully requests that the Court deny the petition of Ernst & Young ("E&Y-Canada") for a writ of certiorari to review the judgment of the Court of Appeals for the State of Michigan.

STATEMENT OF THE CASE

This case does not raise an issue of global significance for accountants or other professionals. The lone issue presented is whether the auditor of a Canadian insurance company that has Michigan as its domicile for purposes of regulation in the United States can be sued in Michigan by the Insurance Commissioner on claims arising from

misleading audited financial statements and the auditor's opinions on those statements. The Michigan Court of Appeals found jurisdiction on the basis of evidence that (1) the auditor expressly acknowledged to the Commissioner that its audit opinions would be provided to him and could be relied upon by him as its client's primary United States regulator, pursuant to a requirement of Michigan law; (2) the audit opinions were, in fact, delivered to the Commissioner and to Michigan policyholders; and (3) the auditor profited from the arrangement.

The decision below in no way conflicts with the principles of personal jurisdiction this Court has established. The Michigan Court simply applied those principles to the unique facts of this case. Similarly, E&Y-Canada's contention that the United States Courts of Appeals have expressed conflicting legal standards lacks substance. The Courts of Appeals, like the Michigan Court, have consistently applied this Court's clearly articulated legal principles to the facts of each case. There exists neither a need nor a basis for granting a writ of certiorari.

A. The Lawsuit

This case arises out of the collapse of Confederation Life Insurance Company ("CLIC"), a Toronto-based mutual life insurer. Many years ago, CLIC selected Michigan as its "state of entry" into the United States. This act established Michigan as CLIC's United States domicile and the Michigan Insurance Commissioner as its primary regulator in this country, where CLIC conducted the majority of its business.[1] As required by the Michigan insurance code, CLIC placed assets in a United States trust for

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[1] CLIC's operations in the United States were referred to as the "United States branch", which included all of CLIC's assets and liabilities in this country. CLIC's audited financial statements for 1990, 1991, 1992 and 1993 show that its revenues from the United States branch substantially exceeded its Canadian revenues.

the payment of claims of United States policyholders in the event of insolvency.

On August 12, 1994, the Ingham County Circuit Court, State of Michigan, entered an order placing CLIC's United States branch into rehabilitation proceedings under the insurance code and appointing the Commissioner rehabilitator.[2] As rehabilitator, the Commissioner is authorized to bring actions on behalf of the insurer's United States policyholders and the rehabilitation estate. To help address a $1 billion shortfall in the United States trust, the Commissioner commenced this action in June, 1995 against E&Y-Canada and other parties responsible for damages suffered by United States policyholders. The complaint alleges claims against E&Y-Canada for professional negligence, fraud, breach of contract and negligent misrepresentation in connection with its audits of CLIC's financial statements for the years 1990, 1991, 1992 and 1993.

E&Y-Canada filed a motion to dismiss for lack of personal jurisdiction, which the circuit court denied. The Michigan Court of Appeals granted a discretionary interlocutory appeal and affirmed the circuit court. The Michigan Supreme Court denied E&Y-Canada's application for leave to appeal.

B. Statement of Material Facts

1. E&Y-Canada Agreed to Comply With the Michigan Insurance Code

Independent auditors play a critical role in Michigan's regulation of insurance. Chapter 10 of the insurance code, MCL 500.1001 *et seq.*,[3] requires an insurer to desig-

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[2] Simultaneously, CLIC's Canadian operations were placed in liquidation proceedings under Canada's Winding-Up Act.

[3] Relevant sections of MCL 500.1001 *et seq.* are set forth in the Appendix *infra*.

nate an independent auditor and to file annually with the Michigan insurance bureau the report of the independent auditor on its financial statements. With E&Y-Canada's permission, CLIC designated that firm as its independent auditor.[4] Section 1009(2) of the insurance code, MCL 500.1009(2), requires that the insurer file a letter from its independent auditor certifying its awareness that the audited financial statements will be filed with the Commissioner and that its audit opinion would be expressed in conformity with the Michigan insurance code and the relevant accounting standards.[5] E&Y-Canada gave CLIC such an "awareness letter" for submission to the insurance bureau.

2. E&Y-Canada's Engagement With CLIC Connected It Inextricably to Michigan

E&Y-Canada fully appreciated that Michigan, on behalf of all the states, regulated CLIC in the United States. In its summary review memorandum on the 1992 audit, E&Y-Canada quite accurately described its client's Michigan connection:

> In the United States, insurance regulation is generally a state, rather than a federal, function. . . . [T]he insurer's state of domicile [has] primary responsibility for solvency and corporate matters.
>
> Confederation is licensed to transact life insurance business in, and is subject to regulation and supervision by, every state in the United States, as well as the District of Columbia and Puerto Rico. Confederation has designated Michigan as its "state of entry"

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[4] Section 1001 of the insurance code, MCL 500.1001, allows a Canadian insurer to designate a Canadian chartered accountant to serve in that role. *See* Appendix *infra*.

[5] For Canadian insurers, Michigan accepts financial statements that comply with Canadian generally accepted accounting standards and the requirements of the Canadian insurance regulator. MCL 500.1025. *See* Appendix *infra*.

> which is treated as its state of domicile for purposes of reporting and examination.

From its audits, E&Y-Canada also knew that CLIC had many Michigan policyholders.[6] E&Y-Canada's "audit profile" for the 1992 CLIC audit begins:

> In accepting an audit engagement, *we assume a responsibility to the policyholders of* Confederation Life, the Superintendent of Financial Institutions and *other foreseeable parties who rely on the information* presented in the financial statements of Confederation Life Insurance Company and its subsidiaries.

Emphasis added.

E&Y-Canada addressed its audit opinions for each year "To The Policyholders and Directors of Confederation Life Insurance Company." These audit opinions were available to all CLIC policyholders as part of CLIC's annual reports.

3. E&Y-Canada is Not a Localized Canadian Business

As a member of an international Ernst & Young organization,[7] E&Y-Canada promotes its services and solicits its business far beyond the borders of Canada. The Ernst & Young firms exploit the international scope of their activities, describing Ernst & Young in promotional literature as a "leading international professional services firm" with "a service force of over 60,000 people in more than 600 cities in over 100 countries." Insurance is an area in which E&Y-Canada and its sister firms claim international expertise: "Worldwide, we focus on major transnational industries: manufacturing/high technology, finan-

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[6] Deferred savings plans for Michigan state employees were some of CLIC's largest policyholders, holding approximately $90 million of CLIC guaranteed investment contracts.

[7] E&Y-Canada is a member of Ernst & Young International, an umbrella organization to which all firms practicing under the Ernst & Young name throughout the world belong.

cial services, insurance, and energy." Moreover, E&Y-Canada's audits of CLIC were international in scope. Personnel from Ernst & Young offices in Toronto, Atlanta and London performed various audit procedures on CLIC, its U.S. branch and its subsidiaries in Canada, the United States and the United Kingdom.

C. The Court of Appeals Decision

The Michigan Court of Appeals had to decide whether the exercise of long-arm jurisdiction over E&Y-Canada, a non-resident partnership, was consistent with the requirements of due process.[8] Applying this Court's "minimum contacts" standard, the Michigan Court held:

> [W]here, as here, there is evidence that the auditors knew the purpose of the audit, knew what the client planned to do with the audit, knew the existence of a third party (the [Commissioner]), and that the third-party would be relying upon the audit, personal jurisdiction may be appropriately exercised.

App. at C-24.[9]

The Michigan Court rejected E&Y-Canada's focus on its lack of "physical" presence in Michigan because the proper test looks to a defendant's "minimum contacts" with the forum. *Id.* at C-13. The Michigan Court examined all of E&Y-Canada's contacts with Michigan, including its "awareness letter" and its explicit acknowledgment of responsibility to CLIC's policyholders and others relying on its audit work. The Michigan Court found that E&Y-Canada: (1) purposefully directed its audits to the Commissioner and Michigan policyholders; (2) had an

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[8] Michigan's long-arm statute has been construed to extend to the limits of due process. *Commissioner of Ins. v. Arcilio*, 561 N.W.2d 412, 421 (Mich. Ct. App. 1997).

[9] The designation "App. at ——" refers to the Appendix to the petition. The Michigan Court of Appeals opinion is attached thereto as Appendix C.

ongoing contractual relationship with a corporate citizen of Michigan; (3) knew that its services were necessary for the continuation of CLIC's business in the United States; and (4) received substantial fees for serving as CLIC's regulatory auditor. Based upon these facts, the Michigan Court concluded that E&Y-Canada had purposefully availed itself of Michigan business opportunities such that jurisdiction over E&Y-Canada was consistent with due process. *Id.* at C-15.

REASONS FOR DENYING THE WRIT

None of the arguments presented by E&Y-Canada to justify a writ of certiorari are persuasive. First, the decision of the Michigan Court does not conflict in any way with previous decisions of this Court. Any perceived conflict results from E&Y-Canada's distorted version of the facts and skewed interpretation of the Michigan Court's opinion. Second, there is no conflict among the Courts of Appeals on the limits of personal jurisdiction over non-resident professionals. The courts have uniformly applied the "minimum contacts" standard. They have reached different conclusions depending only on the varying quality and nature of the defendant's activities in each case. Third, there is no important issue for the Court to decide. The Michigan Court's analysis is consistent with this Court's jurisprudence, and its holding is confined to the unique facts of this case. In particular, the regulatory scheme underlying Michigan's assertions of jurisdiction over E&Y-Canada makes this case an inappropriate platform for a broad consideration of personal jurisdiction over a non-resident professional providing services to a forum resident.

I. THE MICHIGAN COURT'S DECISION FOLLOWS THE MINIMUM CONTACTS ANALYSIS ESTABLISHED BY THIS COURT

The exercise of long-arm jurisdiction over a non-resident defendant comports with due process if "the defendant purposefully established 'minimum contacts' in the forum state." *Asahi Metal Indus. Co. v. Superior Court of Calif.*, 480 U.S. 102, 109 (1987) (*quoting Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945). "Minimum contacts" exist where "the defendant has 'purposefully directed' his activities at residents of the forum and the litigation results from alleged injuries that 'arise out of or relate to' those activities." *Burger King*, 471 U.S. at 472 (citations omitted); *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984).

The Michigan Court's decision is fully consistent with these fundamental principles. The Michigan Court stated: "The pivotal question here is not whether E&Y-Canada had physical contact with the forum state (Michigan); it is instead whether E&Y-Canada purposefully established 'minimum contacts'—a sufficient nexus with Michigan—so that requiring E&Y-Canada to defend itself in a suit in Michigan does not offend traditional notions of 'fair play and substantial justice.'" App. at C-13 (*citing International Shoe*, 326 U.S. at 320). The Michigan Court determined that E&Y-Canada, by purposefully directing its audit work to the Commissioner and Michigan policyholders, established "minimum contacts" with the state so that the maintenance of this suit was reasonable.

The Michigan Court also recognized that the " 'purposeful availment' " determination requires a deliberate act on the part of the defendant, rather than " 'random,' 'fortuitous,' or 'attenuated' contacts." App. at C-14 (*quoting Burger King*, 471 U.S. at 475). After a thorough review of the facts, the Michigan Court concluded that

E&Y-Canada had purposefully availed itself of Michigan business opportunities in 1991, 1992 and 1993 because it performed audits for a "statutory corporate citizen" of Michigan, knowing that its contractual relationship with CLIC was a prerequisite for CLIC to do business in Michigan and the United States, and profited from the arrangement. App. at C-15.

The Michigan Court did not attribute the unilateral activities of CLIC to E&Y-Canada to establish personal jurisdiction. E&Y-Canada's characterization of its own contacts with Michigan as "indirect" is highly disingenuous. Not only did E&Y-Canada undertake to perform statutorily required audit services for an insurer domiciled in Michigan but, by its own statements, E&Y-Canada voluntarily and expressly assumed an obligation to CLIC policyholders in the United States, including those in Michigan, and through them to the Commissioner as the primary regulator on behalf of those policyholders. The Michigan Court followed the dictates of this Court in looking to whether the defendant "has created 'continuing obligations' between himself and residents of the forum" or whether the defendant's contacts "proximately result from actions by the defendant himself that create a 'substantial connection' with the forum state" before concluding that the exercise of jurisdiction was proper. *See Burger King*, 471 U.S. at 475-76 (citations omitted).

In a clear distortion of the Michigan Court's decision, E&Y-Canada contends that the court relied on the "foreseeability" argument rejected in *Asahi*, 480 U.S. at 102. In that products liability case, a plurality of this Court held that "the placement of a product into the stream of commerce, *without more*, is not an act of the defendant purposefully directed toward the forum State" and will not support personal jurisdiction. *Id.* at 112 (emphasis added). The Michigan Court, by contrast, found that it was neither mere happenstance nor the "stream of commerce" that brought E&Y-Canada's audit reports to the attention of CLIC's policyholders and the Commissioner:

> . . . [W]e too note that E&Y-Canada did *not* merely place its audits "into the stream of commerce, not having further knowledge regarding where that product might end up." Rather, E&Y-Canada purposefully directed its audit at the [Commissioner] and Michigan policyholders "which is qualitatively different than the mere act of placing its product into the stream of commerce."

App. at C-16 (*quoting Starbrite Distrib., Inc. v. Excelda Mfg. Co.*, 562 N.W.2d 640, 644-45 (Mich. 1997) (emphasis in original)).

To predicate jurisdiction on this analysis is entirely consistent with this Court's due process decisions. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980) ("[T]he foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State . . . [but] is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.").

II. DECISIONS OF THE COURTS OF APPEALS INVOLVING NON-RESIDENT PROFESSIONALS REFLECT THE UNIFORM APPLICATION OF DUE PROCESS PRINCIPLES

There is no "conflict" among the Courts of Appeals concerning when due process permits long-arm jurisdiction over a professional. When E&Y-Canada's cases are reviewed in their entirety, it is clear that the courts have applied the minimum contacts standard consistently, with the results dependent on the fact-specific inquiry into a particular defendant's contacts with the forum state.

None of the cases cited by E&Y-Canada turn on the issue of foreseeability alone. *See* Petition at 16-22. In each case, the court examined the nature and quality of the defendant's specific acts and conduct to determine whether the exercise of personal jurisdiction was proper

and consistent with this Court's holdings. In those cases where the defendant had at most incidental contacts with the forum state, or where the defendant's services were not specifically connected to acts in the forum giving rise to the suit, the courts found no jurisdiction. *Young v. FDIC*, 103 F.3d 1180, 1191-92 (4th Cir.) (auditor's use of one piece of information from bank account in forum in preparation of financial statements insufficient to connect the accountant to the forum), *cert. denied*, 118 S. Ct. 329 (1997); *Sawtelle v. Farrell*, 70 F.3d 1381, 1390-91 (1st Cir. 1995) (communications sent by defendant lawyers to plaintiffs in forum about litigation being conducted in another state too tenuous for jurisdiction); *Austad Co. v. Pennie & Edmonds*, 823 F.2d 223, 226-27 (8th Cir. 1987) (same); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1387-88 (8th Cir. 1993) (accountant's transmittal of public company's financial statements for filing with SEC which were then reviewed by plaintiffs in forum insufficient basis for jurisdiction); *Leasco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1342 (2d Cir. 1972) (transmittal of auditor's report to potential investors, without further involvement of auditor in activities that gave rise to suit, insufficient to establish minimum contacts).

On the other hand, courts have exercised jurisdiction where the nature of the professional services the defendants rendered was such that the defendants were aware that their actions could have a substantial effect in the forum state. *Robinson v. Giarmarco & Bill, P.C.*, 74 F.3d 253, 258-59 (11th Cir. 1996) (where attorney provided estate planning services for forum resident, knowing that the forum would probate and administer the estate, forum had jurisdiction over attorney in negligence action arising out of services); *Bullion v. Gillespie*, 895 F.2d 213, 217 (5th Cir. 1990) (non-resident doctor's act of shipping drugs to patient in forum for use in doctor's experiment was sufficient contact for jurisdiction in tort claim arising from use of drugs); *T.M. Hylwa, M.D., Inc. v. Palka*,

823 F.2d 310, 314 (9th Cir. 1987) (accountants' contract to provide personal services to client in forum state created continuing obligation sufficient for minimum contacts).

These decisions evidence no disagreement over principles or confusion over applicable standards that would warrant review and clarification. E&Y-Canada's real complaint is that the Michigan Court reached the wrong conclusion based on E&Y-Canada's version of the critical facts. That, however, would not justify a writ of certiorari.

III. THE MICHIGAN COURT'S DECISION IS NARROW

To inflate the significance and potential impact of the Michigan Court's decision, E&Y-Canada complains that "the simple act of performing professional services for a multinational corporation will subject that same professional firm to suit anywhere the multinational corporation does business." Petition at 23. The Michigan Court's decision does not sweep so broadly. It is limited to the context of the state-based scheme of insurance regulation in which independent auditors serve a critical function. As the Michigan Court noted: "The underlying purpose behind Michigan's comprehensive insurance regulations would be eviscerated if an accounting firm could voluntarily provide misleading financial information about an insurer to the [Commissioner] and escape liability in this state." App. at C-20. The influence of the regulatory scheme, including CLIC's citizenship under it, pervades the Michigan Court's analysis.

E&Y-Canada ignores the significance of Michigan's interests and focuses on the supposed burdens created by the exercise of jurisdiction over it. *See* Petition at 23-24. As the scope of the CLIC audits themselves show, E&Y-Canada's activities are not limited to Canada. In this regard, E&Y-Canada informs the Court that accounting work relating to CLIC in the United States was performed only by Ernst & Young LLP, the United States member

of the Ernst & Young firm. *See id.* at 5. It neglects to mention that Ernst & Young LLP has moved for its dismissal from this suit on the ground that only E&Y-Canada issued an audit opinion and that E&Y-Canada directed all of the U.S. entity's activities. If E&Y-Canada and Ernst & Young LLP could not be sued in the same forum, these inconsistent positions could produce inconsistent verdicts, permitting the Ernst & Young family to escape all liability for a defective audit. Such a result would be both manifestly unjust and wholly out of touch with modern economic realities.[10]

E&Y-Canada is an active member of an association of commonly named accounting firms that touts its global presence in pursuit of trans-border business. E&Y-Canada enjoyed the benefits of its multinational engagement for CLIC and cannot now avoid answering in Michigan for the consequences that have followed. Its claim of unfair burden rings hollow.

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[10] Even a Canadian court has recognized Michigan's interest in dealing with the claims arising out of CLIC's insolvency and the minimal burden on E&Y-Canada if forced to litigate here. E&Y-Canada attempted to pursue a claim in Canada against a CLIC subsidiary that is now in bankruptcy, on the theory that the subsidiary would be liable to E&Y-Canada for any damages E&Y-Canada incurred in this litigation. The Ontario Court of Appeals held that E&Y-Canada should litigate its claim against the subsidiary in Michigan. E&Y-Canada has since named the bankruptcy trustee for the subsidiary as a third-party defendant in this litigation.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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April 24, 1998.

APPENDIX

MCL 500.1001. Definitions

As used in this chapter:

(a) "Audited financial report" means the report required in section 1005 and furnished pursuant to section 1007.

(b) "Independent public accountant" means an independent certified public accountant or accounting firm in good standing with the American institute of certified public accountants and in good standing in all states in which they are licensed to practice. For Canadian and British companies, "independent public accountant" means a Canadian-chartered or British-chartered accountant.

MCL 500.1009. Independent public accountants or accounting firms; registration with commissioner; letter of awareness; notification of dismissal or resignation, letter regarding disagreements

(1) Each insurer required by this chapter to file an annual audited financial report shall register with the commissioner in writing, within 60 days after becoming subject to this requirement, the name and address of the independent public accountant or accounting firm retained to conduct the annual audit under this chapter. Insurers not retaining an independent public accountant on the effective date of this chapter shall register the name and address of their retained independent public accountant not less than 6 months before the date when the first financial report is to be filed.

(2) The insurer shall obtain a letter from the insurer's independent public accountant and shall file a copy with the commissioner stating that the independent public accountant is aware of the insurance code's provisions and the rules and regulations of the state of domicile's insur-

ance department that relate to accounting and financial matters and affirming that he or she will express his or her opinion on the financial statements as to whether they conform to the accounting practices prescribed or otherwise permitted by the department, specifying the exceptions as he or she believes appropriate.

(3) If the independent public accountant for the immediately preceding filed audited financial report is dismissed or resigns, the insurer shall notify the commissioner within 5 business days of this event. The insurer shall also furnish the commissioner with a separate letter within 10 business days of the above notification stating whether in the 24 months preceding the event there were any disagreements with the former independent public accountant on any matter of accounting principles or practices, financial statement disclosure, or auditing scope or procedure, which disagreements, if not resolved to the satisfaction of the former independent public accountant, would have caused the former independent public accountant to refer to the subject matter of the disagreement in connection with his or her opinion. The disagreements required to be reported in response to this section include both those resolved to the former independent public accountant's satisfaction and those not resolved to the former independent public accountant's satisfaction. Disagreements contemplated by this section are those that occur at the decision-making level between personnel of the insurer responsible for presentation of its financial statements and personnel of the independent public accounting firm responsible for rendering its report. The insurer shall also request in writing the former independent public accountant to furnish a letter addressed to the insurer stating whether the independent public accountant agrees with the statements contained in the insurer's letter and, if not, stating the reasons for which he or she does not agree. The insurer shall furnish this responsive letter from the former independent public accountant to the commissioner together with its own.

MCL 500.1025. Canadian and British insurers; annual statement of total business, contents of independent public accountant's letter

(1) For Canadian and British insurers, the annual audited financial report is the annual statement of total business, on the form filed by those companies with their domiciliary supervision authority, and duly audited by an independent chartered accountant.

(2) For insurers listed in subsection (1), the independent public accountant's letter required in section 1009 shall state that the independent public accountant is aware of the requirements relating to the annual audited statement filed with the commissioner pursuant to section 1005 and shall affirm that the opinion expressed is in conformity with those requirements.

Supreme Court, U.S.
FILED
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CLERK

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No. 98-1589

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ERNST & YOUNG, a Canadian Partnership of Chartered Accountants, *Petitioner,*

vs.

THE COMMISSIONER OF INSURANCE OF THE STATE OF MICHIGAN, *Respondent.*

On Petition For A Writ Of Certiorari To The Court Of Appeals Of The State Of Michigan

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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8 pp

No. 98-1589

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October Term, 1997

ERNST & YOUNG, a Canadian Partnership
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THE COMMISSIONER OF INSURANCE
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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Respondent's theory — as clearly set out in his papers and as adopted by the Michigan Court of Appeals — is that E&Y-Canada is subject to suit in Michigan, notwithstanding the professional restrictions on its practice that preclude it from practicing public accountancy in Michigan, because E&Y-Canada allegedly "knew" or was aware that its audit opinions issued to its Canadian client in Canada under Canadian rules would be forwarded by its client into Michigan (and other jurisdictions) and relied upon by third parties there. (Resp. Br. at 6 (citing App. at C-24).) In the eyes of Respondent and the Michigan Court of Appeals, the "purposeful availment" requirement for personal jurisdiction is thus satisfied by evidence of the defendant's "knowledge" or "awareness" of potential impact within the forum, with nothing more as a purported minimum contact.

The Michigan Court of Appeals' holding represents one side of a long-standing divergence of opinion among the lower courts (and, as to another area of practice, this Court) concerning whether the "purposeful availment" standard contemplates that foreign professionals who render intangible services outside the forum to foreign clients choosing to do business in the forum may themselves be subject to suit in the forum based upon their "knowledge" or "awareness" rather than upon their affirmative or "purposeful" conduct. Respondent's arguments demonstrate the need for this Court to provide much-needed guidance and clarification on the appropriate standard to assert personal jurisdiction over foreign professionals providing intangible services *outside* the forum to foreign clients that unilaterally choose to do business *inside* the forum. If the Michigan Court of Appeals' holding is correct, a professional may be liable in countless jurisdictions where he or she is not licensed to practice and has never set foot, because of an awareness that his or her opinion or advice will — due to the acts of another — have an effect in the jurisdiction.

Eleven years have passed since the Court last attempted to provide a workable definition of purposeful availment. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987). In *Asahi*, the plurality sought to clarify whether, in a products liability context, a foreign manufacturer purposefully avails itself of a particular forum state if it is aware that, after the sale of its product to another foreign entity, some of its product will be distributed into the forum state. The plurality concluded that without additional conduct by the manufacturer indicating its intent or purpose to serve the market for its product in that forum, a manufacturer's mere "awareness" that its product may or will be sold in the forum does not constitute purposeful availment. *Asahi*, 480 U.S. at 112. Four justices, however, disagreed with the plurality, arguing that when a manufacturer is aware that a chain of distribution (as opposed to a consumer)

will carry its product into the forum state, that awareness may be sufficient for minimum contacts purposes. *Id.* at 120 (Brennan, J., concurring in part) (citing *World-Wide Volkswagen v. Woodson*, 444 U.S. 286, 306-07 (1980) (describing *World-Wide Volkswagen* majority opinion as distinguishing cases "involving goods which reach a distant State through a chain of distribution and a case involving goods which reach the same State because a consumer . . . took them there")).

Although the *Asahi* plurality's holding has been treated by many courts as the guiding opinion in the products liability context, courts have separately diverged on the meaning and application of the "purposeful availment" standard when the defendant is a nonresident professional rendering intangible services outside the forum, the benefits of which follow the client into the forum. One school of thought, adopted by the Fifth, Ninth and Eleventh Circuits and the Michigan Court of Appeals in this case, is that the mere act of rendering professional services outside the forum to a client residing or doing business in the forum manifests that firm's own intent to serve the forum state — even when the firm, due to professional restrictions, does not and cannot have any other contact or connection with the forum. (Pet. at 21-22.)

By contrast, the First, Second, Fourth, Sixth, and Eighth Circuits have concluded that without additional, purposeful acts by the professional firm indicating the firm's intent to satisfy its own business goals in the forum rather than those of its client, the mere "awareness" that a client may or will carry the product of the firm's professional services into the forum is not enough to constitute purposeful availment of the forum within the meaning of the Due Process Clause. (Pet. at 16-21.)

Respondent's attempt to reconcile these diverging schools of thought is unavailing and confirms that in this important area

of constitutional due process, similar facts yield vastly different results, depending upon no more than the forum in which the professional happens to be sued. Respondent contends that the Fifth, Ninth, and Eleventh Circuits were presented with cases in which the nonresident professionals "were *aware* that their actions could have a substantial effect in the forum state" (Resp. Br. at 11 (emphasis added)). All of the cases described in the Petition, however, involved nonresident professionals who were *aware* that their actions could have a substantial effect in the forum state; such awareness logically flows from the professional's knowledge of its client's business plans or state of residence, and of the corresponding likelihood that the client would, to serve its own business goals, decide to direct into the forum state the product of the professional services rendered to it elsewhere. (Pet. at 16-21.) In all of these cases, it was also undisputed that the nonresident professional had no direct contacts with the forum apart from those ancillary to the out-of-state client relationship. Yet, in some instances, the professional's awareness was deemed sufficient to support personal jurisdiction without additional contacts and in other instances it was not.

The majority and dissenting opinions in the court below mark precisely the same point of divergence: whether, when the Due Process clause requires "*purposeful* availment" of the forum, "awareness" of potential effect within the forum is sufficient. The facts, as evidenced in the record, relied upon by the Court of Appeals, and conceded by Respondent, show that E&Y-Canada committed no acts in Michigan and has no connection with Michigan apart from the fact that it rendered accounting services in Canada to a Canadian client, CLIC, that had chosen to do business in Michigan and throughout the

United States.[1] The sole basis for the court's ruling, therefore, is E&Y-Canada's "awareness" of its client's connection to Michigan and the likelihood that the product of its services rendered in Canada — the audit opinion — would be forwarded by CLIC to Michigan, among other places, and relied upon in those locations. Respondent points to nothing else.

Respondent contends that this case is "unique" because it involves a state insurance code. The Michigan Insurance Code is only relevant to this Petition insofar as it explains how a Canadian audit report prepared in Canada under Canadian rules by a Canadian accounting firm for a Canadian insurance company came to be forwarded into Michigan by that insurance company. Otherwise, it has no impact on the minimum contacts analysis applied by Respondent or the Michigan Court of Appeals. The Michigan Insurance Code accords no special weight to the identity of the plaintiff as an insurance commissioner who expressly represents the interests of CLIC's policyholders (who, in a mutual insurance company, are the equivalent of shareholders of a corporation). If Respondent were correct that his identity as an insurance commissioner renders this case "unique," then the protections of the Due Process

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[1] Respondent acknowledges that CLIC was licensed to transact business in Canada and the United Kingdom as well as every state in the United States, the District of Columbia and Puerto Rico, and that CLIC was subject to regulation and supervision in each of those jurisdictions. (Resp. Br. at 4.) CLIC, formerly the fourth largest insurance company in Canada, had numerous policyholders in each of those jurisdictions. Michigan was CLIC's state of entry into the United States and therefore was its primary regulator in this country, but Michigan was not CLIC's headquarters or principal place of business in the United States; rather, CLIC's United States headquarters were in Atlanta, Georgia. Respondent acknowledges that E&Y-Canada's audit opinions on CLIC's consolidated financial statements were addressed to CLIC's Board of Directors and *all* of its policyholders. (Resp. Br. at 9.)

Clause would be rendered a dead letter solely because a state regulator is the plaintiff.

As Respondent acknowledges in a footnote (contrary to his assertions in the main text of his brief), the Michigan Insurance Code did not place any special or unique requirements on E&Y-Canada's audits of CLIC, nor did it require a commitment from E&Y-Canada to express its audit opinion in conformity with Michigan law. (Resp. Br. at 4 n.5 (citing Mich. Comp. Laws § 1025(2)). Rather, Canadian laws, rules, and accounting procedures governed the performance of E&Y-Canada's accounting and auditing services.

The plain fact is that, if correct, the holding of the Michigan Court of Appeals would apply in any case where the professional could be shown to be aware that its advice would be relied upon in a distant forum. There would be no reason why the awareness would need to be established by a writing such as the awareness letter in this case. In any event, E&Y-Canada was aware in this instance that its client would forward its audit opinions to many places, not just Michigan.

This Court has held on multiple occasions that the Due Process Clause requires a degree of predictability to the personal jurisdiction analysis "that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." *World-Wide Volkswagen*, 444 U.S. at 297; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). That degree of predictability, which necessarily is based on uniformity of treatment from jurisdiction to jurisdiction, is lacking for nonresident professionals under the current confused state of the law. E&Y-Canada respectfully requests that this Court grant its Petition for a Writ of Certiorari to clarify how the "purposeful availment" standard should be applied to

nonresident professionals providing intangible services to multistate or multinational clients.

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May 6, 1998